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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LIGGETT GROUP INC. and
LIGGETT & MYERS TOBACCO CO., INC.,
Petitioners,

—v.—

PUBLIC CITIZEN,
THE AMERICAN CANCER SOCIETY,
THE AMERICAN HEART ASSOCIATION,
THE AMERICAN LUNG ASSOCIATION and
THE AMERICAN PUBLIC HEALTH ASSOCIATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Where a proteetive order was concededly valid when entered and reaffirmed, the case has been dismissed and the time to appeal has expired, do the Federal Rules of Civil Procedure implicitly create a substantive right which enables persons not parties to the case to obtain access to private discovery material which was not used in the adjudication of the case, and which such persons intend to use for purposes totally unrelated to the case?

PARTIES BELOW

This petition seeks review of a decision by the United States Court of Appeals for the First Circuit entitled *Public Citizen et al. v. Liggett Group Inc. et al.*, 858 F.2d 775 (1st Cir. 1988). The parties appearing in the United States Court of Appeals for the First Circuit were Public Citizen, American Cancer Society, American Heart Association, American Lung Association and American Public Health Association, who appeared as non-party movants-appellees (collectively, "Non-Party Movants") and Liggett Group Inc. and Liggett & Myers Tobacco Co., Inc. (collectively, "Liggett"), who appeared as defendants-appellants.[1] The controversy here arises in connection with discovery produced in *Ann M. Palmer et al. v. Liggett Group Inc. et al.*, Civil Action No. 83-2445-MA, United States District Court for the District of Massachusetts. Plaintiffs in that action took no part in the proceedings at issue here at the Court of Appeals level. Conversely, the Non-Party Movants in the proceedings at issue were not parties in the *Palmer* case.

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[1] As required by Supreme Court Rules 21.1 and 28.1, the following is a listing of the parents, subsidiaries (except wholly owned subsidiaries) and affiliates of petitioner Liggett Group Inc.: B. S. LeBow Inc., L. Holdings Inc., Liggett & Myers Tobacco Co. of Canada Limited, United States Gold Co., South Dakota Gold Company Inc. and Sarah Coventry, Inc. Petitioner Liggett & Myers Tobacco Co., Inc., is a wholly owned subsidiary of petitioner Liggett Group Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners Liggett Group Inc. and Liggett & Myers Tobacco Co., Inc., respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on September 28, 1988.

OPINIONS BELOW

The protective order at issue here was entered by the District Court on February 25, 1985. [M-1].[2]

[2] Numbers in brackets refer to pages of the Appendix to this petition.

The orders of the District Court affirming the continuing validity of the February 25 Order were entered on July 16, 1985 [K-1; L-1], July 19, 1985 [J-1], and August 12, 1985. [H-1; I-1].

The order of the District Court modifying the February 25 Order was entered on January 28, 1988. [E-1].

The opinion of the Court of Appeals for the First Circuit affirming in part and reversing in part was issued on September 28, 1988 [A-1] and is published at 858 F.2d 775 (1st Cir. 1988).

JURISDICTION

The opinion of the Court of Appeals for the First Circuit was entered on September 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This petition concerns Rules 1 and 26(c) of the Federal Rules of Civil Procedure. Rule 1 provides:

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 26(c) provides:

> **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the

discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

STATEMENT OF THE CASE

Certain crucial points involved in this petition are not in dispute. The protective order entered in the District Court on February 25, 1985 (hereinafter the "February 25 Order"), the post-judgment modification of which is the subject of this petition, was a valid protective order at the time it was entered. The Non-Party Movants conceded that such protective order was valid, and the First Circuit assumed its validity. [A-12]. This case was dismissed as a matter of law. The discovery material covered by this protective order, to which the Non-Party Movants seek access, played no role whatsoever in the dismissal of the action. The Non-Party Movants assert no common law or First Amendment rights which enable them to obtain the discovery material. They claim access to the discovery material for purposes unrelated to the case solely on the basis of the Federal Rules of Civil Procedure.

The decision of the First Circuit violates the most basic policies of the Rules of Civil Procedure, fails to follow this Court's opinion in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), and will have far-reaching and dire consequences for the fair and equitable application of discovery rules throughout the country.

The District Court's Protective Orders

During the pendency of *Palmer*, both plaintiffs and Liggett had obtained protective orders preventing public dissemination of discovery materials. The February 25 Order, which covered information produced by plaintiffs and non-party witnesses as well as by Liggett, provided in Paragraph 2 that "[a]ll information produced or exchanged in the course of this civil action . . . shall be used solely for the purpose of this case." [M-1]. Paragraph 13 of the order stated that within 45 days of "the final adjudication or settlement of all claims in this case, counsel for the parties either shall return all documents produced, if so requested by the producing party, or shall destroy all such documents." [M-5]. The order gave a further level of protection to any information that the parties might specifically designate as "confidential."

In the course of discovery, plaintiffs served two sets of interrogatories on Liggett and deposed two individual officers of Liggett. Plaintiffs also subpoenaed documents from non-party Arthur D. Little, Inc. ("ADL"), a private consulting organization that had performed research work for Liggett beginning in the early 1950s. Among other materials, Liggett obtained the medical and psychiatric records of the plaintiffs' decedent during discovery.

On several occasions during the lawsuit, the February 25 Order was challenged, but was reaffirmed each time by the District Court. In June 1985 plaintiffs filed a "Notice of Intent to Disseminate Documents" to Dow Jones & Company, Inc. ("Dow Jones"), publishers of *The Wall Street Journal*, thereby necessitating a motion by Liggett to compel plaintiffs'

compliance with the February 25 Order. [L-1]. The District Court granted Liggett's motion. [L-4]. In July 1985, Dow Jones sought leave to intervene to seek modification of the February 25 Order in order to obtain access to the ADL documents. That motion was denied. [J-3].

On July 23, 1985, Dow Jones moved for reconsideration of the prior motion to intervene in light of a decision modifying a protective order handed down by the United States District Court in *Cipollone v. Liggett Group Inc.*, 106 F.R.D. 573 (D.N.J. 1985). On August 12, 1985, the District Court denied Dow Jones's motion for reconsideration, but stated that the motion could be renewed following the decision of the Third Circuit on defendants' mandamus petition in *Cipollone*. Dow Jones never renewed its motion.

The Dismissal of the Lawsuit

On April 8, 1986, Liggett moved to dismiss certain of plaintiffs' statutory and common law claims on the ground that such claims were preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §1331 *et seq.* (the "Act"). The District Court denied Liggett's motion, but certified the issue for appeal. Liggett then appealed to the First Circuit. Certain of the Non-Party Movants appeared as *amici* in support of affirmance.

On August 25, 1987, the First Circuit handed down its opinion in *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987), reversing the District Court and holding that plaintiffs' claims were preempted by the Act. [B-1]. The case was remanded to the District Court. Liggett then renewed its motion to dismiss on the ground that, under the First Circuit's decision, each of the claims in plaintiffs' complaint was preempted. Plaintiffs opposed the renewed motion to dismiss on the ground that certain claims remained outstanding in their complaint. On October 6, 1987, the District Court granted Liggett's motion and dismissed *Palmer* in its entirety. [G-1]. On the following day, October 7, 1987, final judgment was entered in favor of Liggett. [C-1].

The February 25 Order remained in effect at the time of final judgment. The discovery materials at issue here played no role in the dismissal.

Following dismissal of the *Palmer* action, pursuant to Paragraph 13 of the February 25 Order, Liggett and ADL requested that plaintiffs' counsel return all discovery materials to the producing parties. Plaintiffs took no appeal from the dismissal of their action and time to appeal expired on November 6, 1987.

The Motion by the Non-Party Movants

On December 28, 1987, almost three months after final judgment — and one-and-half months after the time for all appeals had run — the Non-Party Movants filed a motion to vacate the protective orders that had been entered in the action, including the February 25 Order, and to require the filing of all discovery material with the court pursuant to Rule 5(d) of the Federal Rules of Civil Procedure so that the public could have access to it. [E-1].

The Non-Party Movants' motive in seeking the pre-trial discovery materials produced in *Palmer* had nothing to do with the substance of the litigation. Rather, their reason was to use the materials to advance their own interests in "educating" the public according to their own views, and to make the materials available to members of Congress.

The District Court granted the Non-Party Movants' motion. [E-1]. At Liggett's request, the District Court stayed enforcement of the Order pending the results of Liggett's appeal to the First Circuit.

The Decision in the Court of Appeals

Petitioners appealed the order of the District Court to the First Circuit, which reversed the order in so far as it required the filing of discovery materials in court under Rule 5(d), but affirmed the District Court's lifting of the February 25 Order.

The First Circuit held that Rule 26(c)'s good cause requirement implicitly or presumptively makes all discovery materials public in the absence of a protective order. Even though the February 25 Order was valid when entered, the First Circuit concluded that the dismissal of the case as a matter of law constituted a sufficient change in circumstances to justify modification of the protective order. The parties were authorized to disseminate private discovery material to anybody for any use whatsoever. [A-31].

REASONS FOR GRANTING THE WRIT

BY CREATING A BROAD RIGHT OF PUBLIC ACCESS TO PRIVATE DISCOVERY MATERIALS WHICH HAVE PLAYED NO ROLE IN THE ADJUDICATION OF A PROCEEDING, THE DECISION BELOW VIOLATES THE PURPOSE AND INTENT OF THE FEDERAL RULES OF CIVIL PROCEDURE AS INTERPRETED BY THIS COURT IN *SEATTLE TIMES* AND WILL BURDEN THE FEDERAL COURTS WITH A SUBSTANTIAL INCREASE IN DISCOVERY DISPUTES AND PROTECTIVE ORDER LITIGATION

The important national issue raised by this petition is whether materials produced in discovery under the Federal Rules of Civil Procedure are presumptively non-public, and are to be used solely in the litigation, or whether they are presumptively public, allowing litigants to make discovery material freely available for any purpose whether or not related to the litigation in which they were produced. The First and Second Circuits have ruled that the good cause requirement of Rule 26(c) makes discovery material presumptively public. Other courts have taken a different view.

We submit that the holding of the First Circuit violates the language and intent of the Federal Rules of Civil Procedure and fails to follow this Court's decision in *Seattle Times*. It creates a very serious threat to the privacy rights of litigants and other persons who are compelled to produce their private records in the discovery process. Furthermore, the holding that discovery materials are presumptively public will inevitably result in an increase in discovery disputes and protective order litigation, making the whole discovery process even more contentious than it is at present, placing additional burdens on an already overtaxed federal judiciary. In addition, the holding threatens to change radically the function and purpose of the discovery process, from assisting in the fair adjudication of litigated disputes to providing a means for individuals, businesses or special interest groups, in furtherance of their own self-interests,

to gain access to the private business and financial records of parties and non-party witnesses.

This case raises the issue squarely and clearly. It is an appropriate vehicle for this Court to exercise its supervisory powers over the lower federal courts so that the Federal Rules of Civil Procedure which govern the discovery process are interpreted and applied consistently throughout the country in a manner which protects the legitimate privacy interests of all litigants and witnesses. The Non-Party Movants based their claim to obtain private discovery materials for non-litigation purposes solely on the Federal Rules of Civil Procedure. It was conceded by all below, and acknowledged by the First Circuit, that the Non-Party Movants had no common law or First Amendment rights to this material.

Furthermore, the protective order entered by the District Court on February 25, 1985, was valid when entered. As a result of the protective order, discovery proceeded smoothly in this case, with minimal participation by the court. Eventually, the case was dismissed as a matter of law; the discovery material played no role in that decision. After the time to appeal had expired, the Non-Party Movants sought access to this discovery material, *admittedly for purposes having nothing to do with the litigation*. Nothing in the Federal Rules of Civil Procedure countenances such use of discovery material. Since the case was dismissed as a matter of law and the discovery material played no role in the dismissal, the discovery material was irrelevant to any judicial determination of the case. Nevertheless, because the First Circuit considered discovery material presumptively public, it held that plaintiffs' counsel could make the private records of Liggett and ADL available to the Non-Party Movants or anyone else to serve their private agendas. The First Circuit ruled that dismissal of the case was a change in circumstances such that the protective order which preserved the privacy interests of Liggett and ADL should be stripped away. To the contrary, the dismissal of the case on the merits without regard to the discovery material makes it more imperative that the privacy interests at stake be protected.

It is a blatant injustice that the private material of Liggett and ADL, under these circumstances, now becomes the property of plaintiffs' attorney, enabling him to give or sell it in whole or in part, in or out of context, to anyone for any use.

A. *The Decision Below Disregards the Privacy Interests of Litigants Under the Federal Rules of Civil Procedure as Interpreted by This Court in Seattle Times*

The decision of the First Circuit violates the meaning and intent of the Federal Rules of Civil Procedure and is contrary to the ruling of this Court in *Seattle Times*. Rule 1 of the Federal Rules of Civil Procedure expressly provides that their purpose is to "secure the just, speedy, and inexpensive determination of every action." In *Seattle Times*, this Court ruled that

> [l]iberal discovery is provided for the *sole* purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; *discovery also may seriously implicate privacy interests of litigants and third parties.* The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery.
>
> There is an opportunity, therefore, for litigants to obtain – incidentally or purposefully – information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes. Cf. *Herbert* v. *Lando*, 441 U.S. 153, 176-177 (1979); *Gumbel* v. *Pitkin*, 124 U.S. 131, 145-146 (1888). As stated by Judge

> Friendly in *International Products Corp.* v. *Koons*, 325 F. 2d 403, 407-408 (CA2 1963), "[w]hether or not the Rule itself authorizes [a particular protective order] . . . we have no question as to the court's jurisdiction to do this under the inherent 'equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices' " (citing *Gumbel* v. *Pitkin*, *supra*). The prevention of the abuse that can attend the coerced production of information under a State's discovery rule is *sufficient justification for the authorization of protective orders.*

Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34-36 (1984) (emphasis added, footnotes omitted).

The First Circuit simply ignored one of the basic tenets of *Seattle Times*: liberal discovery is provided by the Federal Rules for the *sole* purpose of prosecuting and defending a federal lawsuit. This fundamental principle cannot be squared with the holding and result reached by the First Circuit. Any use of discovery material outside the sole purpose for which it was produced is not presumptively or implicitly authorized by Rule 26(c), which was designed to protect the privacy of litigants and third-party witnesses. The intended non-litigation use of the discovery material by the Non-Party Movants is precisely the kind of abuse of the Federal Rules of Civil Procedure which this Court said Rule 26(c) was designed to prevent. Those who receive it are free to use the formerly protected material "to annoy, embarrass and oppress" Liggett, and it is obvious that the Non-Party Movants intend to use this material, if at all possible, to that purpose as well.[3]

While acknowledging that this Court's decision in *Seattle Times* "must serve as the background for any claimed right of

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[3] Disregarding this good cause for the continuation of the protective order, the First Circuit discussed only the impact of the protective order on a fair trial. In this regard, the First Circuit ignored the fact that Liggett is presently a defendant in many other cases involving claims for damages due to smoking across the country, including two in the United States District Court for the District of Massachusetts. *Baker v. Liggett Group Inc.*, C.A. No. 86-1326-W (D. Mass.); *Kotler v. American Tobacco Co.*, C.A. No. 86-0810-S (D. Mass.)

access to discovery materials" [A-23], the First Circuit first chose to disregard what it termed "expansive language" in *Seattle Times* and then tried to distinguish it on the ground that the case concerned only the application of the First Amendment to access to discovery materials, not the application of the Federal Rules of Civil Procedure. [A-24].

But this Court not only ruled in *Seattle Times* that protective orders issued on good cause are not subject to heightened First Amendment scrutiny; it also ruled on when protective orders are properly issued under Rule 26(c).[4] Under that ruling, the February 25 Protective Order should not have been disturbed.

The only post-*Seattle Times* case relied on by the First Circuit was *In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139, 140 (2d Cir.) *cert denied sub nom. Dow Chemical Co. v. Ryan*, 108 S. Ct. 344 (1987), where the Second Circuit ruled that under the Federal Rules of Civil Procedure discovery material is presumptively public. For the reasons stated above, this holding by the Second Circuit also violates the Federal Rules and *Seattle Times*. *Agent Orange*, however, was a much different case than this one. There, a class action had been settled, and putative members of the class, among others, wanted to obtain discovery material ostensibly in connection with the settlement. Thus, it could be argued that the discovery material was sought in connection with the litigation.

In *Agent Orange*, the Second Circuit relied in part for its holding on the fact that the discovery material at issue had been ordered filed by the District Court, pursuant to Rule 5(d) of the Federal Rules of Civil Procedure, before the order allowing its dissemination was issued. That was not the case here. The discovery material had never been filed, and the First Circuit held that the District Court no longer had the power to order

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[4] While the case arose from the State of Washington, the Washington Rules of Civil Procedure were based on the Federal Rules. The holding in *Seattle Times* applies directly to the Federal Rules.

its filing post-judgment. Thus, Rule 5(d) has no application to this case. In any event, Rule 5(d) is an administrative, housekeeping rule that cannot displace the principles that discovery is solely for the litigation at hand and that parties and witnesses are entitled to protection of their privacy.

Furthermore, if material is ordered filed under Rule 5(d), a party is at least on notice that it may become publicly available and has the opportunity to obtain a protective order. Under the First Circuit's view that Rule 26(c) makes all discovery material presumptively public, the material can be disseminated without notice, after which it will be too late to prevent the invasion of privacy.

The decisions of the First and Second Circuits not only do violence to the Federal Rules and *Seattle Times*, they also seriously undermine the right to privacy, which has always been a cornerstone of American democracy. As Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), said:

> [The makers of our constitution] conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.

Seattle Times is not the only case where this Court has recognized that considerations of privacy have always been present during the discovery phase of a litigation. Chief Justice Burger summarized the situation when he observed that

> [i]t has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants.

Gannett Co. v. DePasquale, 443 U.S. 368, 396 (1979) (Burger, C.J., concurring).

An earlier decision of the Second Circuit stressed that discovery is for use in preparation for trial and "not to educate

or titillate the public." *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied sub nom. Citytrust v. Joy*, 460 U.S. 1051 (1983). The Sixth Circuit has referred to the "presumptively non-public fruits of civil discovery." *Courier-Journal v. Marshall*, 828 F.2d 361, 367 (6th Cir. 1987).

Finally, a different panel of the First Circuit, in *F.T.C. v. Standard Financial Management Corp.*, 830 F. 2d 404 (1st Cir. 1987), clearly distinguished between documents which played a role in the adjudication of the case, to which the public has access, and materials "used only in discovery" which "lie beyond reach." *Id.* at 408.

We submit it is essential that this Court give guidance to the lower federal courts in the proper application of the Federal Rules and *Seattle Times* on this very important issue so that the right to privacy of litigants and non-party witnesses throughout the country are protected.

B. *If the Decision Below Is Allowed to Stand, the Federal Courts Will Be Burdened with a Substantial Increase in Discovery Disputes and Protective Order Litigation*

The decision of the First Circuit, unless reversed and the principles of *Seattle Times* reaffirmed, will inevitably result in an increase in litigation over protective orders, litigation resisting discovery, and attempts by third parties to intervene in existing and even concluded litigation to gain access to discovery material for non-litigation purposes. This is not a theoretical parade of horribles. It is actually happening, and will increase unless this Court exercises its supervisory powers to give clear guidance to the lower courts with respect to the application of *Seattle Times* to the discovery process.

A casual glance at the cases cited in the decision below, in this brief and collected in *Mokhiber v. Davis*, 537 A.2d 1100 (D.C. 1988), demonstrates how often parties have been compelled to defend their privacy interests against claims of public access to discovery materials. If the First Circuit is correct that the good cause requirement of Rule 26(c) makes discovery material presumptively public in the absence of a

protective order, private business or personal records produced in discovery can be disseminated without limitation immediately upon production. The only way a party or non-party witness can protect the privacy of its records is to resist discovery altogether or seek a protective order before the material is produced. Thus, in every case where a party or non-party witness does not want its private records widely disseminated it must seek a protective order as a matter of course before providing any material.

According to the First Circuit, parties or witnesses seeking protective orders would have to show on a document-by-document basis that they should be protected as trade secrets or the equivalent. [A-29]. Thus, Rule 26(c) would be of little help to litigants and witnesses who want to protect the privacy of business or personal records which do not rise to the level of trade secrets but which still should remain private. Individuals, businesses and organizations in this country are entitled to conduct their affairs in private as they see fit. If they become embroiled in litigation, it is not considered undue interference with their privacy if they are compelled to produce private business and personal records for the purpose of reaching a just determination of the action. It *is* an undue interference with the privacy of litigants and witnesses if their private records become the property of total strangers, who would otherwise never even see such information, but who can now use or abuse it for any purpose.

The First Circuit's reading of Rule 26(c) would eliminate the ability of parties and witnesses to protect the privacy of business and personal records, notwithstanding the clear language of this Court in *Seattle Times* that Rule 26(c) was designed to protect the privacy interests of parties and witnesses from exactly the kind of abuse Liggett now faces. Under the decision below, parties could use the threat of disclosure of discovery material as a club to bludgeon settlements, *see Joy v. North*, *supra*, or to dissuade plaintiffs from bringing meritorious actions as recognized by this Court in *Seattle Times*. 467 U.S. at 36 n. 22.

Furthermore, not only would the First Circuit's decision result in greatly increased disputes over production of material and

protective orders, its document-by-document approach would require judges and magistrates to review a sea of documents to determine whether they were trade secrets or their equivalent. Precisely to avoid such burdens, courts have approved umbrella protective orders to facilitate discovery. *See, e.g., In re Consumers Power Co. Securities Litigation*, 109 F.R.D. 45, 54-55 (E.D. Mich. 1985); *Chambers Development Co., Inc. v. Browning-Ferris Industries*, 104 F.R.D. 133, 135 (W.D. Pa. 1985); *In re Korean Air Lines Disaster of September 1, 1983*, 597 F. Supp. 621, 622-23 (D.D.C. 1984); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F. Supp. 866 (E.D. Pa. 1981). *See also Quinter v. Volkswagen of America*, 676 F.2d 969 (3d Cir. 1982).

In addition, the First Circuit's decision that the Federal Rules provide non-parties with a substantive right to private discovery material will encourage more intervention, or even the filing of lawsuits, by all kinds of special interest groups, all claiming to act for the "public interest," to exploit the discovery process in order to advance whatever ends they happen to be championing at any particular time.[5] Apparently, the privacy of parties and witnesses can be violated whenever a party or intervenor can convince a court that the case involves a matter of "public interest," an extremely vague standard of little substantive content which will embroil the courts in endless litigation and which has nothing to do with the sole purpose of discovery: to prepare a case for trial. The First Circuit has authorized precisely the abuse of the discovery process which this Court in *Seattle Times* held Rule 26(c) was supposed to prevent.

In this case alone, six non-party organizations have sought access to discovery material for purposes totally unrelated to the litigation, Dow Jones and the Non-Party Movants here. Attempts by non-parties to invade the privacy rights of Liggett and ADL resulted in several motions before the District Court and an appeal to the First Circuit. This hardly promotes the just, speedy, and inexpensive determination of litigation.

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[5] A different panel of the First Circuit was concerned about the time-consuming and expensive nature of this type of dispute which excessively disrupts the litigation process. *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986).

This Court can put an end to this vexatious litigation and its attendant burdens on an already overtaxed federal judiciary by simply reaffirming the principles of *Seattle Times* and giving clear directions to lower courts to follow them.

CONCLUSION

For the reasons set forth above, petitioners respectfully pray that a writ of certiorari be granted to review the opinion of the Court of Appeals for the First Circuit.

Dated: New York, New York
November 18, 1988

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 18 1988
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88-825

No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LIGGETT GROUP INC. and
LIGGETT & MYERS TOBACCO CO., INC.,
Petitioners,

—v.—

PUBLIC CITIZEN,
THE AMERICAN CANCER SOCIETY,
THE AMERICAN HEART ASSOCIATION,
THE AMERICAN LUNG ASSOCIATION and
THE AMERICAN PUBLIC HEALTH ASSOCIATION,
Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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**Opinion of the Court of Appeals,
dated September 28, 1988**

PUBLIC CITIZEN, AMERICAN CANCER SOCIETY,
AMERICAN HEART ASSOCIATION,
AMERICAN LUNG ASSOCIATION and
AMERICAN PUBLIC HEALTH ASSOCIATION,

Plaintiffs-Appellees,

— v. —

LIGGETT GROUP INC. and
LIGGETT & MYERS TOBACCO CO., INC.

Defendants-Appellants.

No. 88-1195

United States Court of Appeals,
First Circuit
Decided September 28, 1988

Before: BOWNES and BREYER, Circuit Judges,
and CAFFREY,* Senior District Judge

BOWNES, *Circuit Judge*:

Liggett Group, Inc., and Liggett & Myers Tobacco Co. (collectively "Liggett") appeal an order of the district court modifying an earlier protective order covering discovery materials produced by

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* Of the District of Massachusetts, sitting by designation.

Liggett. Request for the modification came from a group of public health organizations represented by Public Citizen Litigation Group ("Public Citizen").[1] Liggett contends that Public Citizen lacked standing to request modification, both because it failed to obtain status as an intervening party under Rule 24 of the Federal Rules of Civil Procedure and because it had no substantive right of access to the materials in question, and that it failed to establish adequate circumstances justifying the modification. We affirm in part but modify the district court's order.

I. BACKGROUND

A. *Initial Proceedings*

On August 26, 1980, Joseph C. Palmer died of lung cancer after having smoked cigarettes made by Liggett for a number of years. Three years later, Palmer's wife and mother filed a diversity action against Liggett in United States District Court for the District of Massachusetts. The Palmers asserted various state law claims against Liggett based on Liggett's allegedly inadequate warnings about the health risks of smoking.

Discovery began in 1984 and, during the course of discovery, three protective orders were entered by the district court. The first two orders, dated January 17, 1984, and January 25, 1985, pertained to the confidentiality of the plaintiffs' medical records. They are not at issue here. It is the third protective order, providing broad protection for documents produced by Liggett, which is the center of the current controversy.

This protective order grew out of plaintiffs' January 22, 1985 deposition subpoena directed to the custodian of documents at Arthur D. Little, Inc. ("Little"). Little is a private consulting firm that performed research work for Liggett in the early 1950's.

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[1] The organizations are American Cancer Society, American Heart Association, American Lung Association and American Public Health Association.

Pursuant to the subpoena and by agreement of the parties, plaintiffs' counsel were permitted to inspect eighteen boxes of documents at Little's offices on January 30-31, 1985. Counsel began copying documents on February 1, 1985. On February 5, Liggett moved for a protective order under Rule 26(c) barring any nonlitigatory use of the Little documents and of all future discovery in the action. In support of its request, Liggett asserted that plaintiffs' discovery requests encompassed massive numbers of documents and that it would be "physically impossible for [Liggett] to designate individually each document containing confidential or secret information."

The plaintiffs opposed the protective order on the ground, among others, that Liggett had waived its claims to confidentiality by previously allowing counsel to review and copy the Little documents. The district court granted Liggett's motion and signed the protective order on February 25, 1985.

The order as approved had two components. The first is a blanket provision mandating that "[a]ll information produced or exchanged in the course of this civil action or any appeal arising therefrom . . . shall be used solely for purposes of this case." The second provides heightened protection for any materials explicitly designated by a party as "confidential." With regard to both categories of materials, the protective order provides that "[w]ithin forty-five days after the final adjudication or settlement of all claims in this case, counsel for the parties either shall return all documents produced, if so requested by the producing party, or shall destroy all such documents. All copies of all documents, and all information and notes derived from them, also shall be destroyed."

Subject to the restrictions of the protective order, plaintiffs' counsel copied approximately 1200 documents (one box full) from the eighteen boxes of Little documents to which the plaintiffs had access. None of these documents were ever designated by Liggett as confidential. The documents have remained in the possession of plaintiffs' counsel since that time.

On June 7, 1985, the *Wall Street Journal* wrote a letter to the district court expressing interest in seeing the Little

documents and seeking advice on how best to proceed in obtaining a modification of the protective order. One week later, plaintiffs' counsel filed a "Notice of Intent to Disseminate [the Little] Documents" to the *Wall Street Journal*. In support of their proposed action, plaintiffs cited Liggett's failure to designate any documents as confidential and to articulate any reason why release of the documents would harm Liggett. Plaintiffs also pointed out that many of the documents had been marked as exhibits for trial and thus would be made public eventually anyway. Liggett opposed the plaintiffs' proposed action, arguing that the protective order was still in full force, and, on June 28, 1985, filed its own "Motion to Require Compliance With Protective Order."

In response, plaintiffs filed a motion for clarification or modification of the February 25 protective order. Plaintiffs argued that the order should be read as applying only to documents designated as confidential, because otherwise it would extend protection to information whether or not it qualified as confidential under the federal rules. At this point, the *Wall Street Journal* also sought leave to intervene in the action and filed its own request for clarification or modification. On July 16, 1985, the district court refused to modify the protective order and allowed Liggett's motion to compel compliance. It noted: "The dissemination of this material will not aid in the fair trial of this case. The trial is public and the *Wall Street Journal* is, of course, able to attend the trial." Plaintiffs' and the *Wall Street Journal*'s motions were denied.

One week later, the *Wall Street Journal* moved for reconsideration of the district court order. The *Journal*'s motion was based primarily on the decision in *Cipollone* v. *Liggett Group, Inc.*, 106 F.R.D. 573 (D.N.J. 1985), handed down the day after the order to compel compliance was issued in this case. Like the Palmers' case, *Cipollone* involved state law claims that inadequate warnings by Liggett had caused the death of a Liggett cigarette smoker. In the cited decision in *Cipollone*, Judge Sarokin had substantially modified a protective order, previously approved by a magistrate, which was "identical" to the February 25, 1985 protective order in this case. *Id.* at 579. Judge Sarokin

found that the provision extending blanket protection to documents not designated as confidential "overstep[ped] the bounds permitted by Rule 26(c)" and he accordingly modified the order to extend only to confidential information. *Id.* at 584. Although acknowledging that its analysis diverged from Judge Sarokin's, the district court in this case denied the motion to reconsider. It noted: "*Motion denied, without prejudice to renew.* The Sarokin opinion is now under appeal. This motion should be renewed following a ruling by the Third Circuit Court of Appeals."[2]

In April of 1986, Liggett moved to dismiss certain of plaintiffs' claims on the ground that they were preempted under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.* The district court denied the motion but certified the question pursuant to 28 U.S.C. § 1292(b), to this court, which reversed. *Palmer* v. *Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987). We held that in passing the Act, Congress had struck a "carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of the national economy" and that permitting the interposition of state actions into the area would excessively disrupt the congressional scheme. *Id.* at 626 (quoting *Cipollone* v. *Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 907 (1987)). The Palmers' state law claims were thus preempted.

In light of our opinion, Liggett moved in the district court to have the Palmers' complaint dismissed and judgment entered

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[2] The Third Circuit eventually issued a writ of mandamus, noting errors in Judge Sarokin's analysis, and remanded for reconsideration. *Cipollone* v. *Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986). On remand, Judge Sarokin modified his analysis with respect to documents designated as confidential, but nonetheless found that Liggett had failed to establish good cause for protection under Rule 26(c). Judge Sarokin also stuck by his original order striking down the blanket protection for undesignated documents. *Cipollone* v. *Liggett Group, Inc.*, 113 F.R.D. 86 (D.N.J. 1986). The Third Circuit subsequently denied Liggett's petition for mandamus concerning that decision, and the Supreme Court denied a Liggett petition for certiorari on December 7, 1987. *Cipollone* v. *Liggett Group, Inc.*, 822 F.2d 335 (3d Cir.), *cert. denied*, 108 S. Ct. 487 (1987).

for Liggett. Over the plaintiffs' objections, the district court granted the motion and entered judgment for Liggett on October 6, 1987. No appeal was taken.

B. *Public Citizen's Motion for Access to Discovery Materials*

On December 28, 1987, Public Citizen filed two motions in district court. In its first motion, Public Citizen sought interlocutory relief: an order mandating that the parties maintain and not destroy or return discovery materials in the Palmer case pending resolution of its second motion. This first motion was allowed by the district court the same day. The second motion sought a modification of the February 25, 1985 protective order such that all discovery materials could be freely disseminated, except for those documents in which Liggett had "good cause" for continued confidentiality. It also requested that the district court order the parties to file all discovery materials in court. The broad relief requested by Public Citizen seemingly applied to materials produced both by Liggett and the plaintiffs, but, in argument, Public Citizen made clear that it sought access only to the Little documents produced by Liggett.

Public Citizen based its access claim on Rules 5(d) and 26(c) of the Federal Rules of Civil Procedure. Rule 5(d) provides:

> All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

Rule 26(c) provides in pertinent part:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the

> discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a desposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Rule 5(d), Public Citizen argued, creates a presumption that all discovery materials will be available to the public because they will be filed in court. Moreover, under Rule 26(c), public access can be cut off through a protective order only upon the showing of "good cause." Especially in light of the district court's dismissal of the Palmers' claims in this case, Public Citizen asserted that good cause for the February 25, 1985 protective order no longer existed. Thus, it said, the order should be modified and Rule 5(d) filing of discovery materials ordered.

Public Citizen did not make a formal motion to intervene in the case pursuant to Rule 24. Rather, it sought to proceed informally under Rule 16(g) of the Local Rules of the United States District Court for the District of Massachusetts. Local Rule 16(g) is based on Rule 5(d) of the Federal Rules, but it actually reverses in part the filing presumption of Rule 5(d), by providing that discovery materials ordinarily are *not* to be filed in court "unless so ordered by the court or for use in the proceeding." Essentially, Rule 16(g) codifies the local practice of district courts always ordering – as Rule 5(d) permits – that discovery materials otherwise subject to the Rule 5(d) filing requirement *not* be filed pursuant to Rule 5(d) unless the court asks that they be filed. To

facilitate this scheme, Rule 16)g) provides that parties and nonparties may request that filing be ordered:

> If for any reason a party or concerned citizen believes that any [discovery documents subject to the Rule 5(d) filing requirement] should be filed, an *ex parte* request may be made that such document be filed, stating the reasons therefor. The court may also order filing *sua sponte*.

Believing that Rule 16(g) thus obviated the need for obtaining formal intervenor status in order to request filing, Public Citizen sought relief as a nonparty. In the event the district court thought intervention necessary, however, Public Citizen did ask to be granted intervenor status and argued that intervention had been routinely granted in the past when nonparties sought access to judicial records.

Liggett opposed the motion on a number of grounds. It claimed first that Public Citizen could participate only as a Rule 24 intervenor and that the time for requesting intervention had passed. For this reason, Liggett said, Public Citizen lacked standing. Liggett also disputed Public Citizen's interpretation of Rule 5(d), maintaining that it created no general right of public access to discovery materials. Finally, Liggett argued that even if Public Citizen had standing to seek public access, there had been no showing of compelling need for a modification.

The district court held a hearing on January 28, 1988, with counsel for Liggett, Public Citizen and the plaintiffs present.[3] The court began by considering whether it still had jurisdiction over the matter, in light of its previous order of dismissal and judgment for Liggett on the merits. It found that jurisdiction did exist, because the outstanding protective order presented a live controversy extending past the dismissal of the underlying

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[3] Although the plaintiffs had not filed a formal response to Public Citizen's request, the plaintiffs vigorously supported Public Citizen's efforts at the hearing. As they had previously, plaintiffs said that they were interested in disseminating to the public the Little documents in their possession.

claims. The court also agreed with Public Citizen that there is a right of public access to discovery materials under the federal rules, a right that was especially strong in this case because of the important public health concerns surrounding the documents in question. Moreover, the court said, Liggett had failed to establish any compelling need for continuing the protective order. The court accordingly ordered that the eighteen boxes of Little documents to which the plaintiffs had access, along with the documents already in the plaintiffs' possession, be filed in court and made available to the public.[4]

The district court issued a stay pending appeal and this appeal followed.

II. THE DISTRICT COURT'S POWER

We begin our analysis, as did the district court, by examining the court's jurisdiction, or power, to issue discovery-related orders after the court dismissed the underlying claims and entered a judgment on the merits. In so doing, we think it is important to distinguish between two separate and distinct aspects of the district court's January 28, 1988 order which is under review: the modification of the protective order and the order that the parties file the discovery materials in court.

Under Local Rule 16(g), the parties to this case were, as parties to cases in the District of Massachusetts generally are, excused from filing discovery materials in court. The effect of this nonfiling was to deny the public the right it would otherwise have had to inspect freely the discovery materials in this case,

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[4] Unsure whether Liggett actually had designated any discovery materials as confidential under the February 25, 1985 protective order, Public Citizen had, in its motion for modification, suggested that documents which Liggett maintained were confidential might be exempted from filing, subject to in camera review by the district court to insure that they were indeed confidential. At the hearing, however, it was brought out by plaintiffs that no designations had been made, and Public Citizen apparently abandoned its suggestion for document-by-document review of the materials. In any event, the district court ruled that Liggett's time for designating documents as confidential had passed and that only documents containing trade secrets would be exempt from the court's filing order.

because the materials were not kept in any publicly accessible location. Certainly the public has no right to demand access to discovery materials which are solely in the hands of private party litigants. Rule 16(g) does not in any way limit the use or dissemination of discovery materials by *parties*. Indeed, the Supreme Court has noted that parties have general first amendment freedoms with regard to information gained through discovery and that, absent a valid court order to the contrary, they are entitled to disseminate the information as they see fit. *See Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 31-36 (1984); *see also Okhahoma Hospital Ass'n* v. *Okhlahoma Publishing Co.*, 748 F.2d 1421, 1424 (10th Cir. 1984), *cert. denied*, 473 U.S. 905 (1985). In this case, the only thing limiting the parties' rights to disseminate discovery materials was the protective order of February 25, 1985, which barred nonlitigatory use of the Little documents.

Prior to the entry of that order the situation was this: the parties were not required to release publicly the discovery materials by filing them, but they were free to disseminate them if they chose to do so. *Cf. Oklahoma Hospital Ass'n*, 748 F.2d at 1424 ("While it may be conceded that parties to litigation have a constitutionally protected right to disseminate information gained by them through the discovery process absent a valid protective order, it does not follow that they can be compelled to disseminate such information") (citing *Seattle Times*, 467 U.S. 20). The same situation would have again existed on January 28, 1988, if the district court had modified or vacated the protective order, but not ordered filing under Rule 5(d). Instead, however, in response to Public Citizen's request, the district court both modified the protective order by virtually eliminating it, *see* note 4 *supra*, and ordered filing, without much distinguishing between these two aspects of its order. Because we believe that the two aspects raise separate legal issues and concerns, we consider them individually.

With respect to the filing aspect of the court's order, we believe that by the time the district court acted on January 28, 1988, it lacked the power to impose such new requirements on the

parties. Accordingly, we vacate that part of the district court's order.

Our reasoning is simple. The district court's judgment of October 6, 1987, was a final dismissal on the merits, concluding the litigation between the Palmers and Liggett. It left no substantive issue unresolved and it contained no provisions for equitable relief that would have required ongoing supervision by the district court. Under these circumstances, we think that the court simply lacked power to impose any new, affirmative requirements on the parties relating to discovery. *See Cooper* v. *R.J. Reynolds Tobacco Co.*, 256 F.2d 464, 466-67 (1st Cir.) (once a district court dismisses a complaint and enters judgment, it lacks the power to grant a motion to amend the complaint), *cert. denied*, 358 U.S. 875 (1958); *Bailey* v. *Proctor*, 166 F.2d 392, 395 (1st Cir. 1948) (a district court's jurisdiction to modify its own order exists "as long as no final order has been issued"); *see also Littlejohn* v. *BIC Corp.*, 851 F.2d 673, __ (3d Cir. 1988) ("[A]bsent allegations of fraud or other extraordinary circumstances, trial exhibits that were restored to their owner after a case has been completely terminated and which were properly subject to destruction by the clerk of court are no longer judicial records within the 'supervisory power' of the district court").

To be sure, a district court has limited power to undo or alter a judgment after the judgment has been entered. Within strict time constraints, a court may amend a judgment under Rule 59. Courts may also correct clerical mistakes, Fed. R. Civ. P. 60(a), and even, for good reason, grant a party relief from judgment. Fed. R. Civ. P. 60(b). But no such relief was requested or granted here. The district court assumed, as did the parties, that the October 6, 1987 judgment was valid and final.

It is important to note that the purpose of discovery is to enable parties to an action to obtain material "which is relevant to the subject matter in the pending action," a purpose that obviously can no longer be served once a case has been dismissed. Indeed, once a case has been dismissed and rights to appeal have lapsed, parties are under no obligation, legal or practical, even to preserve discovery materials they have obtained. In this

case, for instance, both the plaintiffs and Liggett were free to destroy all the Little documents in their possession long before Public Citizen filed its motion, rendering any Rule 5(d) filing order meaningless.[5] Thus, although the district court had the power under Rule 5(d) to order filing of discovery materials during the pendency of the action, we hold that the court's power did not extend to postjudgment action.

Turning next to the district court's modification of the protective order, we think that an entirely different analysis applies. Unlike the filing order of January 28, 1988, the protective order was entered on February 25, 1985, long before the dismissal and judgment and at a time when the court clearly had the power to supervise and issue orders concerning discovery.[6] Moreover, the protective order, by its own terms, extended until forty-five days *after* the "final adjudication or settlement" of the Palmers' claims.[7] During the pendency of the protective order, including times after judgment, the order acted as an injunction, setting forth strict limitations on the parties' use of discovery materials.

In support of this "injunction," the district court necessarily had the power to enforce the order, at any point while the order was in effect, including periods after judgment. As was demonstrated by the court's order to compel compliance in the face of plaintiffs' expressed intention to provide the Little documents to the *Wall Street Journal*, violation of the protective order during its lifetime would have exposed the parties to

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[5] Counsel for Public Citizen conceded at oral argument that the parties could have destroyed the discovery materials prior to Public Citizen's motion without violating the protective order or any other legal requirement and that, in that case, Public Citizen would have been out of luck in seeking access.

[6] On this appeal, no one has contended that the February 25, 1985 protective order was not a valid protective order at the time it was entered. We have assumed, without deciding, that it was indeed valid.

[7] The Palmers' claims were not "finally adjudicated" until November 23, 1987, when the period for petitioning for certiorari review of this court's preemption decision expired. *See* discussion *infra* at 26. Public Citizen's motion of December 28, 1987, was thus made during the allotted forty-five day period, while the protective order was still in effect.

contempt liability. Correlative with this power to enforce, the district court necessarily also retained power to modify the protective order in light of changed circumstances. The Supreme Court established long ago that even an injunction entered by consent of the parties—and this protective order was entered over the objections of the plaintiffs—is always modifiable.

> Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. . . . [A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong.

United States v. *Swift & Co.*, 286 U.S. 106, 114-15 (1932); *see also Coalition of Black Leadership* v. *Cianci*, 570 F.2d 12, 14 (1st Cir. 1978) ("There is little dispute that a sufficient change in circumstances is a meritorious reason for a court to modify an injunction or consent decree."); *Theriault* v. *Smith*, 519 F.2d 809, 810 (1st Cir. 1975); *Food Fair Stores, Inc.* v. *Food Fair, Inc.*, 177 F.2d 177, 186 (1st Cir. 1949). "When dealing with its equitable powers, a court possesses the intrinsic power to adapt the injunction to meet the needs of a 'new day.'" *Transgo, Inc.* v. *Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1030 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986).

Consistent with this well-established rule, we think that the district court in this case had the inherent power to modify its February 25, 1985 protective order for so long as the order was in effect. We note that the courts and commentators seem unanimous in finding such an inherent power to modify discovery-related protective orders, even after judgment, when circumstances justify. *E.g.*, *Ex Parte Uppercu*, 239 U.S. 435, 440 (1915); *FDIC* v. *Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982); *Krause* v. *Rhodes*, 671 F.2d 212 (6th Cir.), *cert. denied*, 459 U.S.

823 (1982); *United States* v. *GAF Corp.*, 596 F. 2d 10, 16 (2d Cir. 1979); *American Telephone & Telegraph Co.* v. *Grady*, 594 F.2d 594, 596-97 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *Olympic Refining Co.* v. *Carter*, 332 F.2d 260, 265-66 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964); Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 41-53 (1983); Note, *Nonparty Access to Discovery Materials in the Federal Courts*, 94 Harv. L. Rev. 1085, 1091-96 (1981).

In sum, although the court lacked power to impose new discovery-related obligations after dismissing the case on the merits, we find that, because the protective order was still in effect, the district court had the power to make postjudgment modifications to the protective order in light of changed circumstances. Accordingly, we move on to consider the propriety of the modification actually ordered.

III. STATUS OF THE NONPARTY MOVANTS

As previously noted, Public Citizen did not secure Rule 24 intervenor status in this case, but rather sought to participate informally under Local Rule 16(g) as a nonparty movant.[8] In the district court, Liggett maintained that intervention was necessary and now, on appeal, challenges the district court's

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[8] Local Rule 16(g) is quoted *supra* at 9-10. Rule 24 provides in relevant part:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by the parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(footnote continued)

modification order on the ground that Public Citizen lacked standing because it was not granted intervenor status. Liggett also claims that Public Citizen was ineligible for Rule 24 intervention in any event because its motion was untimely. We find Liggett's procedural arguments unavailing.

The question of whether nonparty movants may obtain relief in a civil case appears to be one of first impression in this court. Prior third-party challenges to court closures and protective orders have involved either parties who did obtain formal intervenor status, *Anderson* v. *Cryovac, Inc.*, 805 F.2d 1, 3-4 (1st Cir. 1986); *In re San Juan Star Co.*, 662 F.2d 108, 112 (1st Cir. 1981), or criminal cases where intervention is not available. *E.g.*, *In re Globe Newspaper Co.*, 729 F.2d 47, 50 n.2 (1st Cir. 1984); *see also Press Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986) (third-party claim of access to criminal proceeding); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982) (same). We think this fact is significant in and of itself, for it demonstrates that, where intervention is available (*i.e.* civil cases), it is an effective mechanism for third-party claims of access to information generated through judicial proceedings. Like this case, both *Anderson* and *San Juan Star* involved challenges to protective orders covering discovery materials and, in each case, Rule 24 provided a workable means for mounting the challenge. Public Citizen has pointed to no circumstances in this case which made formal intervention impossible or impracticable.

Relying on the language of Rule 24, the Fifth Circuit has previously held that intervention is "*the* procedurally correct course" for third-party challenges to protective orders. *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir. 1979) (emphasis added). We agree. Rule 24(c) provides that "[a] person desiring to intervene *shall* serve a motion to intervene upon the parties as provided in Rule 5. The motion *shall* state the grounds therefor and *shall* be accompanied by a pleading setting forth the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c)

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

(emphasis added). The language of the rule is mandatory, not permissive, and the rule sets forth reasonable procedural requirements to insure that claims for intervention are handled in an orderly fashion. Especially in view of the failure to show that compliance with the rule would be unduly onerous or ineffectual, we are not willing to create a special category of non-Rule 24 intervention for third parties who wish to challenge protective orders through informal motion. Public Citizen should have been granted Rule 24 intervenor status before the district court acted on its motion for access to the discovery materials.

We do not, however, view this error as fatal to Public Citizen's claim. We find two factors persuasive. First, although Public Citizen sought to proceed in the first instance without Rule 24 intervention, it did request, in the alternative, that it be granted intervenor status if the district court thought that intervention was necessary. Second, the district court did afford relief to Public Citizen as if it were a proper party to the case, thus implicitly granting it intervenor status. Under similar circumstances, other federal courts have been quite lenient in permitting participation by parties who failed to comply strictly with Rule 24. In *Beef Industry Antitrust Litigation*, 589 F.2d at 788–89, the Fifth Circuit, while setting down a prospective Rule 24 intervention requirement, was willing to overlook a failure to comply with Rule 24 in a discovery access case in light of "the fact that the district court's acts might be considered equivalent to authorizing intervention." The Third and Eighth Circuits have also overlooked a lack of formal compliance when the district court afforded relief to a nonparty and thus implicitly granted it intervenor status. *United States* v. *Criden*, 675 F.2d 550, 552 n.2 (3d Cir. 1982); *Roach* v. *Churchman*, 457 F.2d 1101, 1104 (8th Cir. 1972); *see also Ex Parte Uppercu*, 239 U.S. 435, 441 (1915) (a pre-federal rules case) (third-party assertion of right of access to discovery materials "requires no particular formality"). We think that a similar approach is appropriate here.

It is clear from the proceedings below that the district court considered Public Citizen to have a legitimate interest in seeking

modification of the protective order. We have no doubt that, had the district court thought Rule 24 intervention necessary, it would have treated Public Citizen's motion as a request for intervention and granted it. That being so, no purpose would now be served if this court were to dismiss the appeal and send this case back to the district court for the rote procedural step of approving intervention. After a substantial delay, the case would still return to us in a similar posture for resolution of the substantive issue underlying this dispute. For purposes of this appeal, then, we will treat Public Citizen as having requested and been granted status as a Rule 24 intervenor. A caveat is, however, in order: "[W]e reiterate that a formal motion for intervention should have been filed pursuant to Rule 24(c). Future litigants should not attempt to use this opinion to circumvent the clear requirements of the rule." *Beef Industry Antitrust Litigation*, 589 F.2d at 789.

We turn next to Liggett's contention that, even if Public Citizen is treated as having requested intervention, its motion to modify was untimely as a matter of law because it was filed on December 28, 1987, twelve weeks after the judgment on the merits in this case and after the time for appeal from that judgment had expired. We begin our analysis with two fundamental principles. First, although Rule 24 requires that an application for intervention be "timely," the rule itself sets down no bright line standard for determining what constitutes timeliness. It has thus been held that "timeliness is to be determined from all the circumstances." *NAACP* v. *New York*, 413 U.S. 345, 366 (1973); *see also Culbreath* v. *Dukakis*, 630 F.2d 15, 20 (1st Cir. 1980). Second, timeliness determinations under Rule 24 are vested in the sound discretion of the district court. *NAACP*, 413 U.S. at 366. Here, the court found that Public Citizen's motion was timely, and we can overturn that ruling only if an abuse of discretion is demonstrated. *See id.*; *Garrity* v. *Gallen*, 697 F.2d 452, 455 (1st Cir. 1983).

It is also important to note that postjudgment intervention is not altogether rare. Numerous courts have allowed third parties to intervene in cases directly analogous to this one, many involving delays measured in years rather than weeks. *E.g.*,

Wilson v. *American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985) (third party permitted to intervene after judicially-approved settlement in order to challenge a seal on court documents); *FDIC* v. *Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982) (third party permitted to intervene and challenge a stipulated confidentiality order two years after a judicially-approved settlement); *Olympic Refining Co.* v. *Carter*, 332 F.2d 260 (9th Cir.) (third party permitted to challenge a protective order three years after the underlying litigation had terminated), *cert. denied*, 379 U.S. 900 (1964); *Mokhiber* v. *Davis*, 537 A.2d 1100, 1104-06 (D.C. 1988) (third party permitted to intervene four years after a judicially-approved consent decree in order to challenge a protective order); *cf. United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977) (permitting postjudgment intervention for purposes of appeal).

Adopting the analysis of the Fifth Circuit in *Stallworth* v. *Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977), this court in *Culbreath* v. *Dukakis* set down a four-part test for determining whether a motion to intervene is timely under the totality of the circumstances.[9] 630 F.2d at 20-24. Applying the same standard to this case, we find no abuse of discretion in the district court's treatment of Public Citizen's motion as timely.

The first *Culbreath* factor to be considered is the length of time that Public Citizen knew or reasonably should have known of its interest in this case before it petitioned to intervene. 630 F.2d at 20. Analysis of this factor is somewhat complicated here. On the one hand, it is clear that Public Citizen knew of the underlying litigation in this case, and therefore implicitly knew of the protective order, long before judgment was entered in the district court. Public Citizen concedes as much and, in fact, Public Citizen represented the same organizations involved in this appeal as *amici* in the earlier appeal to this court on the

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[9] In *Culbreath*, we upheld the district court's denial of intervention on timeliness grounds, but the facts there — attempted intervention *on the merits* four years after the litigation began and two months prior to submission of a consent decree — are far different from those in the present case. We thus refer to *Culbreath* not for its holding *per se*, but for the timeliness test it established.

issue of federal preemption. On the other hand, it is now well-established that it is not the simple fact of knowing that a litigation exists that triggers the obligation to file a timely application for intervention. Rather, the appropriate inquiry is when the intervenor became aware that its interest in the case would no longer be adequately protected by the parties. *United Airlines*, 432 U.S. at 394; *Legal Aid Society* v. *Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980); *Stallworth*, 558 F.2d at 264. By this standard, we have no trouble concluding that Public Citizen moved reasonably promptly.

To begin with, the very same request for modification of the protective order put forth by Public Citizen after judgment had been made by plaintiffs and the *Wall Street Journal* in 1985. In turning down those requests, the district court cited two factors: first, that many of the discovery documents in question presumably would be introduced at trial and made public at that time; and, second, that the very issue of the propriety of this protective order was being litigated in the *Cipollone* case in the Third Circuit, making it appropriate for the court to wait until after the Third Circuit litigation was resolved to decide the protective order issue in this case. Certainly, then, Public Citizen cannot be said to have been untimely for failing to act prior to the resolution of the issues underlying the court's two concerns.

With respect to the first factor, the possibility of trial could not be ruled out prior to October 6, 1987, when the district court dismissed the claims and entered judgment. Moreover, even that judgment did not finally resolve the matter, for the plaintiffs had until November 5, 1987, to appeal the judgment, and the time for plaintiffs to petition for certiorari review of this court's preemption decision (upon which the dismissal was based) did not expire until November 23, 1987. Counting back from the December 28, 1987 filing date of its motion, Public Citizen's delay was, therefore, eight weeks or four weeks depending on which of these latter dates is used. If we refer to the second factor cited by the court—the *Cipollone* litigation—Public Citizen's delay is only three weeks, for, as we indicated in note 2 *supra*, the protective order aspect of the *Cipollone* case was not resolved

until December 7, 1987. In the context of this case, which had been proceeding for well over four years, we do not think that this delay, on the order of weeks, was material.

The second *Culbreath* factor to be considered is the prejudice to existing parties due to Public Citizen's delay in intervening. 630 F.2d at 21. This factor encompasses the basic fairness notion that intervention should not work a "last minute disruption of painstaking work by the parties and the court." *Id.* at 22. For purposes of this factor, therefore, it is necessary to ask *why* a would-be intervenor seeks to participate, for if the desired intervention relates to an ancillary issue and will not disrupt the resolution of the underlying merits, untimely intervention is much less likely to prejudice the parties. Here, of course, Public Citizen's motion pertains to a particularly discrete and ancillary issue, as demonstrated by the fact that the merits of the case have been already concluded and are no longer subject to review. Because Public Citizen sought to litigate only the issue of the protective order, and not to reopen the merits, we find that its delayed intervention caused little prejudice to the existing parties in this case.

The analysis of the District of Columbia Court of Appeals in the recent case of *Mokhiber* v. *Davis*, 537 A.2d 1100 (D.C. 1988), is particularly relevant on this point. In *Mokhiber*, an investigative journalist petitioned to intervene in a civil case in order to gain access to discovery materials and related court filings, which had been placed under a protective order. Judgment in the case had been issued four years previously pursuant to a stipulation of settlement. Like Public Citizen in this case, the journalist in *Mokhiber* sought to modify the protective order to facilitate public access. Although the court eventually denied on substantive grounds the request for modification as to some of the discovery materials, it rejected the notion that intervention four years after settlement was untimely given the "special nature of the right" asserted.

> [O]rdinary principles applicable to intervention do not work well here. The filing of a motion to intervene is simply recognized as an appropriate means of

raising assertions of public rights of access to information regarding matters in litigation. "Intervention of this type may properly be termed *de bene esse*, to wit, action that is provisional in nature and for the limited purpose of permitting the intervenor to file a motion to be considered separately, requesting that access to proceedings or other matters be granted." *Commonwealth* v. *Fenstermaker*, 530 A.2d 414, 416 n.1 (Pa. 1987).

[T]o the extent [a right of access] exists, it exists today for the records of cases decided a hundred years ago as surely as is does for lawsuits now in the early stages of motions litigation. The fact that a suit has gone to judgment does not in any sense militate against the public's right to prosecute a substantiated right to see the records of a particular case. Moreover, access to court records does not involve relitigation of the underlying dispute, so the rationale behind requiring extraordinary circumstances for postjudgment intervention does not as a rule apply to access claims.[10]

[T]he prejudice the parties would suffer from postjudgment access to court documents should not determine the timeliness of the intervention to assert [a] right of access. Instead, assuming an intervenor does assert a legitimate, presumptive right to open the court record of a particular dispute, the potential burden or inequity to the parties should affect not the right to intervene but, rather, the court's evaluation of the merits of the applicant's motion to lift the protective order — that is, the court's judgment as to whether, under the circumstances, the balance of equities favoring sealing overrides any presumptive right of access.

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[10] It is for precisely this reason that Liggett's citation to *Burney* v. *City of Pawtucket*, 728 F.2d 547 (1st Cir. 1984), is misplaced. In *Burney*, we set down a hard and fast rule that intervention on the merits "is never timely . . . if filed after rights to appeal have expired." *Id.* at 549. The *Burney* rule does not, however, and was never intended to apply to cases like this where a party does not seek to disturb the merits, but only to intervene on the separate issue of access to documents.

Id. at 1105-06. We find this analysis compelling and reject the notion that prejudice to the parties in this action would be grounds for denying intervention by Public Citizen.

The third and fourth *Culbreath* factors to be considered are the prejudice that would be suffered by Public Citizen if it were not allowed to intervene and the existence of extraordinary circumstances militating for or against intervention. 630 F.2d at 22, 24. Given our treatment of the first two factors, we need not dwell overlong on these considerations. It is sufficient to note that Public Citizen has asserted, on behalf of the public, a right to have the protective order modified such that the discovery materials may be publicly disseminated, and that, prior to Public Citizen's action, this interest was not being pursued by any of the parties to the case.[11] If Public Citizen's motion is found to be untimely, future intervention attempts will almost certainly also be found to be untimely, and the public's right of access will go untested. As the district court found, there is a strong public interest in the documents at issue, which concern an important public health issue.

Having thus concluded that Public Citizen can be considered as a proper Rule 24 intervening party, we believe it has standing to pursue the public access claim here at issue. Courts, including this one, routinely have found that third parties have standing to assert their claim of access to documents in a judicial proceeding. *E.g.*, *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 354 (11th Cir. 1987); *Anderson* v. *Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986); *In re Globe Newspaper Co.*, 729 F.2d 47, 50 n.2 (1st Cir. 1984); *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981); *see also* cases cited *supra* at 17, 23.[12]

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[11] Although the plaintiffs did seek permission to disseminate the discovery materials at an earlier stage of the litigation and continue to support Public Citizen's claim, they took no steps on their own to have the protective order modified after judgment.

[12] We have uncovered only one access case where standing was found lacking, but that case is clearly distinguishable. *Oklahoma Hospital Ass'n* v. *Oklahoma Publishing Co.*, 748 F.2d 1421 (10th Cir. 1984), *cert. denied*, 473 U.S. 905 (1985),

(footnote continued)

IV. A RIGHT OF PUBLIC ACCESS TO DISCOVERY?

In assessing the claimed right of access in this case, it is helpful to begin by noting what is not being claimed. Unlike many prior litigants in this court and others,[13] Public Citizen has not claimed that it has – independent of the federal rules – a general common law or first amendment right to inspect the discovery materials. Such a claim has been largely foreclosed by the Supreme Court's decision in *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984), which must serve as the background for any claimed right of access to discovery materials.

In *Seattle Times*, members of a religious group sued the Seattle Times in state court for defamation and invasion of privacy. As part of its defense of that case, the Seattle Times sought to discover information regarding membership in and donations to the religious group during the previous five years. When the group resisted, the trial court compelled production, but entered a protective order under the state analog of Federal Rule 26(c) prohibiting the Seattle Times from disseminating or using the information in any way except as necessary to prepare and try its case. The Seattle Times then challenged the protective order as a prior restraint on speech in violation of the first amendment.

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involved a protective order entered by stipulation covering documents solely in the hands of the parties. The court found that a third party lacked standing to attack the protective order because, even if the protective order were modified, the parties in possession of the documents would not, and could not be compelled to, disseminate the documents to the third party. *Id.* at 1424-25. Here, however, far from agreeing to the protective order, the plaintiffs to this action have opposed the protective order at every stage. Moreover, the plaintiffs have indicated clearly that they will disseminate the documents if permitted to do so. Because obtaining a modification of the protective order will, as a practical matter, guarantee Public Citizen access to documents in the plaintiffs' possession, Public Citizen has standing to seek the modification.

[13] *See, e.g., In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 354-55 (11th Cir. 1987); *Anderson* v. *Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986); *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981); *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); *Mokhiber v. Davis*, 537 A.2d 1100, 1109 (D.C. 1988) (collecting cases).

The Supreme Court rejected the Seattle Times's claim and also rejected the suggestion that review of a protective order requires any heightened scrutiny under the first amendment. Although acknowledging that litigants do have limited first amendment rights concerning information obtained through discovery, the Court focused on the fact that discovery is "a matter of legislative grace" and that litigants gain access to discovery materials "only by virtue of the trial court's discovery processes." *Id.* at 31-32. Moreover, the Court said, protective orders "furthe[r] a substantial government interest unrelated to the suppression of expression." *Id.* at 34. Thus, where "a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the first amendment." *Id.* at 37.

As we said in *Anderson* v. *Cryovac, Inc.*, 805 F.2d 1, 6-7 (1st Cir. 1986), the *Seattle Times* decision has not completely eliminated the first amendment as a relevant consideration in reviewing protective orders. *Seattle Times* has, however, established that first amendment scrutiny of protective orders "must be made within the framework of Rule 26(c)'s requirement of good cause." *Anderson*, 805 F.2d at 7.

It is, therefore, very significant that Public Citizen has not asserted a common law or first amendment right of access independent of the federal rules. Rather, Public Citizen has based its claim *on* the federal rules, asserting that, under Rules 5(d) andf 26(c), the public has a presumptive right of access to discovery materials unless good cause for confidentiality is shown, and that no good cause exists here. Nothing in *Seattle Times* or *Anderson* precludes such a claim. Discovery is "a matter of legislative grace," 467 U.S. at 32, but Public Citizen asks for no more than compliance with the legislative scheme embodied in the federal rules.

In seeking to defeat Public Citizen's claim, Liggett and *amici* Product Liability Advisory Council, Inc., and Motor Vehicle Manufacturers Association of the United States, Inc., have pointed to some expansive language in *Seattle Times*, *Anderson* and similar cases to bolster their claim that the public should

not be afforded access to discovery materials. *See, e.g., Seattle Times*, 467 U.S. at 33 ("pretrial depositions and interrogatories are not public components of a civil trial"); *Mokhiber*, 537 A.2d at 1110 ("there exists no common law tradition of access to discovery materials as such"). Liggett and *amici* have used these statements to launch broad-based "policy" arguments to the effect that litigants have legitimate privacy interests in discovery materials and that permitting public access would undermine these privacy interests and excessively disrupt the litigation process. We acknowledge that our own *Anderson* opinion seemingly lends some support to this contention. 805 F.2d at 12 (permitting public access to discovery might actually make the civil discovery process "more complicated and burdensome than it already is"); *see also* Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1 (1983) (generally criticizing claimed rights of public access to discovery).

We think, however, that these arguments and authorities are misplaced here. All of the cases upon which Liggett and *amici* rely are cases where the claimed right of access was based not on the federal rules, but on the common law or the first amendment. They are cases where, in essence, litigants put forth common law and constitutional arguments in an effort to *trump* application of the federal rules standard for protective orders. In rejecting such arguments and adhering to the federal rules standard, courts sensibly have noted that a contrary result would lead to thwarting the interests of privacy and litigative efficiency which are embodied in the federal rules. But nothing in those opinions purported to elevate privacy and efficiency as factors to be considered over and above compliance with the federal rules. Rather, the point of the cases was that, because of privacy and efficiency concerns, the federal rules should be followed.

Thus, when in *Anderson* we noted that "[t]here was no tradition of public access to depositions before [passage of the federal rules in] 1938," we went on to say that now, under Rule 5(d), courts *may* require public filing of discovery requests and responses. 805 F.2d at 12. Likewise, in *Alexander Grant & Co. Litigation*, the Eleventh Circuit recognized that, on the one hand, "private litigants have protectable privacy interests in confidential information disclosed through discovery," but it added

that the means for protecting that privacy interest is Rule 26(c), not judicial fiat. 820 F.2d at 355.

Liggett and *amici* would have us turn these cases on their heads by holding that privacy and litigative efficiency concerns ought to work independently of the federal rules, actually limiting a district court's ability to *deny* protection under Rule 26(c), even when no good cause is shown. We are not willing to do so. This case involves a claim of access to discovery materials under the federal rules and we believe that the merits of the claim must be judged by the text of the rules and the applicable cases interpreting the rules. The rules themselves seek to accommodate concerns of privacy and litigative efficiency, and we find no reason for imposing additional judge-made constraints on the district court's control of discovery. Accordingly, we turn to consideration of the relevant federal rules.

Centrally at issue is Rule 26(c), which permits a district court to issue protective orders covering discovery materials upon a showing of good cause:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense . . . .

As the Second Circuit has noted,

> A plain reading of the language of Rule 26(c) demonstrates that the party seeking a protective order has the burden of showing that good cause exists for issuance of that order. It is equally apparent that the obverse also is true, i.e., if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection. . . . Any other conclusion effectively would negate the good cause requirement of Rule 26(c): Unless the public has a presumptive right of access to discovery materials, the party seeking to

> protect the materials would have no need for a judicial order since the public would not be allowed to examine the materials in any event.

In re Agent Orange Product Liability Litigation, 821 F.2d 139, 145-46 (2d Cir.), *cert. denied*, 108 S. Ct. 289, 344 (1987), aff'g 104 F.R.D. 559, 567 (E.D.N.Y. 1986). Rule 26(c)'s good cause requirement means that, "[a]s a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings." *American Telephone & Telegraph Co.* v. *Grady*, 594 F.2d 594, 596 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *accord*, *Wilk* v. *American Medical Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 101 F.R.D. 34, 38-41 (C.D. Cal. 1984); Note, *Nonparty Access to Discovery Materials in the Federal Courts*, 94 Harv. L. Rev. 1085, 1085-86 (1981). Rule 26(c) thus lends support to the right of access claimed by Public Citizen and found by the district court below.

We agree with the Second Circuit. It is implicit in Rule 26(c)'s "good cause" requirement that ordinarily (in the absence of good cause) a party receiving discovery materials might make them public. In this instance, Public Citizen wished to relieve the plaintiff of the burden of an order that prevented it from making public previously obtained discovery materials. Given the fact that Public Citizen directly benefitted from modification of that order, and for the reasons previously pointed out, we conclude that it had standing to intervene in the case and to ask the court to modify its pre-existing protective order.

V. STANDARD FOR MODIFYING PROTECTIVE ORDERS

Although it is conceded that the governing standard for entry of a Rule 26(c) protective order is good cause, Liggett asserts that a different standard ought to apply when a court considers modifying an existing protective order. Liggett argues that parties to a protective order have legitimate reliance interests in its continued validity and finality. Citing to a Second Circuit opinion, Liggett claims that an existing protective order

can be modified only on a showing of "extraordinary circumstance or compelling need." *Martindell* v. *International Telephone & Telegraph Corp.*, 594 F.2d 291 (2d Cir. 1979); *see also Palmieri* v. *New York*, 779 F. 2d 861 (2d Cir. 1985). Not surprisingly, Liggett finds that no extraordinary circumstances are present here.

We think that Liggett's argument must be rejected. Even accepting that an extraordinary circumstances standard applies, we do not think that the district court erred in modifying the protective order. Control of pretial discovery, including the entry or modification of a protective order, is a matter falling peculiarly within the discretion of the district court. *Agent Orange*, 821 F.2d at 147; *Krause* v. *Rhodes*, 671 F.2d 212, 219 (6th Cir.), *cert. denied*, 459 U.S. 823 (1982); *Wilk* v. *American Medical Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980); 8 C. Wright & A. Miller, *Federal Practice & Procedure* § 2036, at 268 (1970). Here, the district court found that the dismissal on the merits constituted a significant change in circumstances warranting modification of the protective order. Under the circumstances, we cannot say that the court abused its discretion.

To begin with, the protective order modified by the district court was a blanket protective order, that is, it was an order extending broad protection to all documents produced by Liggett, without a showing of good cause for confidentiality as to any individual documents. Although such blanket protective orders may be useful in expediting the flow of pretrial discovery materials, they are by nature overinclusive and are, therefore, peculiarly subject to later modification. *See Manual for Complex Litigation, Second* § 21.431, at 53 & n.60 (1985); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 101 F.R.D. 34, 40-44 (C.D. Cal. 1984). Moreover, as the district court made clear in rejecting pretrial attempts to modify the protective order, the point of this protective order was to promote a fair trial, not to guarantee Liggett perpetual secrecy. *See supra* at 5 ("The dissemination of this material will not aid in the fair trial of this case. The trial is public and the *Wall Street Journal* is, of course, able to attend the trial."). The dismissal of the case on the merits eliminated the possibility of

trial and was, therefore, a significant change in circumstances calling into question the necessity of the protective order. Under similar circumstances, the Second Circuit – the very court that crafted it – found that the extraordinary circumstances test was met. *Agent Orange*, 821 F.2d at 147-48 (upholding the district court's modification of a blanket protective order in light of a settlement of the underlying dispute).

It is argued that a protective order of this sort may lead a party to be more forthcoming in discovery. A protective order may induce a party, for example, to permit an opponent to go through its files, taking relevant material. The party would not insist upon screening the materials first because it would not fear that irrelevant or confidential material, protected by the order, would be made public. Insofar as a rationale of this sort underlay the original protective order, it would seem unfair later to remove that order's protection.

We do not accept this argument as controlling here, however, for one simple reason. As far as we can tell from this record, the particular documents that Public Citizen seeks are *not* documents that were irrelevant to the litigation nor do they contain trade secrets or other specially confidential material. Insofar as it applies to the documents they seek, the protective order did not rest upon the rationale just mentioned. Rather, the court initially protected those documents for a very different reason: namely, the court, believing that the documents would become public in any event during trial, wished to conduct that trial free of the pretrial publicity that might follow premature release of the documents. Liggett, of course, remained free, in respect to any particular document, to argue to the district court that the document in question either was irrelevant to the discovery request or should remain protected as a confidential document for some special reason (such as "trade secrets") that would have prevented its having been made public at trial.

Moreover, we are not convinced that the extraordinary circumstances standard proffered by Liggett is applicable here in any event. For one thing, the *Martindell* case principally relied upon by Liggett is clearly distinguishable, having been based on policy concerns not applicable here. *Martindell* involved an

attempt by the United States government as prosecutor to short cut its normal investigative procedures by obtaining sealed depositions in a shareholder derivative suit to which it was not a party. Pointing out the reliance interests of witnesses who testified pursuant to the protective order without invoking their fifth amendment right against self-incrimination, the Second Circuit refused to modify the protective order. 594 F.2d at 294-97; *see also Palmieri*, 779 F.2d at 863-66 (applying *Martindell* standard and denying a request by New York State to intervene in a private antitrust action to access sealed documents). "[W]hat was critical to *Martindell* . . . was the fact that 'the party seeking access . . . was the federal government, which . . . had at its disposal special investigatory powers not available to private litigants. . . . '" *Palmieri*, 779 F.2d at 866 (quoting *Wilk*, 635 F.2d at 1299-1300). This case, of course, does not involve government intervention and so, even according to the Second Circuit, the justification for the extraordinary circumstances test is not present.

Outside the area of government intervention, courts have applied much more lenient standards for modification. *See e.g.*, *Wilk*, 635 F.2d at 1300 (holding that the court's prior invocation of the extraordinary circumstances test "was an unfortunate choice of words"); *Tavoulareas v. Washington Post Co.*, 737 F.2d 1170, 1172 (D.C. Cir. 1984) (suggesting that the good cause standard of Rule 26(c) governs modifications of protective orders). While we need not decide the matter definitively, we reject the "extraordinary circumstances" standard. In a case such as this, where the party seeking modification has pointed to some relevant change in the circumstances under which the protective order was entered, we think that a standard less restrictive than "extraordinary circumstances" is appropriate. We need not define how "less restrictive" the standard should be because we find that under these facts the district court had the legal power to modify its prior protective order: the reasons underlying the initial promulgation of the order in respect to the particular documents sought no longer exist; and the district court made a reasoned determination that public interest considerations favored allowing counsel to make those particular documents public.

VI. CONCLUSION

The district court's order is affirmed with respect to the modification of the protective order, but reversed with respect to the requirement that the parties file discovery materials in court. The parties are, therefore, free to disseminate discovery materials, but they are not obligated to make them publicly available by filing them in court.

So ordered.

**Opinion of the Court of Appeals,
dated August 25, 1987**

ANN M. PALMER, as Administratrix of the Estate of Joseph C. Palmer, and ANN M. PALMER and DAPHNE S. PALMER,

Plaintiffs-Appellees,

— v. —

LIGGETT GROUP INC. and LIGGETT & MYERS TOBACCO CO., INC.,

Defendants-Appellants.

No. 86-1525

United States Court of Appeals,
First Circuit
Decided August 25, 1987

Before: BOWNES, Circuit Judge, BROWN,* Senior Circuit Judge, and TORRUELLA, Circuit Judge

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BROWN, *Senior Circuit Judge:*

This interlocutory appeal presents one highly disputed issue: whether the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.* (the Act), preempts the Palmers' smoking and health related claims that challenge either the adequacy

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* Of the Fifth Circuit, sitting by designation.

of the federal warning on cigarette packages or the propriety of Liggett's advertising and promotion of cigarettes. In deference to the congressional declaration that (i) cigarettes be labeled uniformly and (ii) a balance be struck between the priority given to tobacco commerce and to our national health policy, we hold that the Act does preempt the Palmers' state law claims, and reverse the decision of the District Court.

A Saga of Cigarette Smoking

Because the certified issue before us is on appeal from a motion to dismiss, we are limited to viewing the facts of the case only as alleged in the pleadings, interrogatory answers, and pretrial submissions of the parties.

Joseph C. Palmer died on August 26, 1980, at the age of 49, allegedly from lung cancer. The Palmers allege that Palmer smoked between three and four packs of Liggett's cigarettes per day until his death.

On August 19, 1983, Ann M. Palmer, individually and as administrator of the estate of her late husband, and her mother-in-law, Daphne S. Palmer, filed this diversity action in the District Court. In their amended complaint, the Palmers contended that liability should be imposed on Liggett because of its failure to warn adequately of the health consequences of cigarette smoking. The Palmers asserted causes of action for common law negligence, breach of warranty under Mass. Gen. Laws c. 106 § 2-314 *et seq.*, and violations of the Massachusetts Consumer Protection Act, Mass. Gen. Laws c. 93A. At bottom, the Palmers complained that Liggett negligently gave inadequate warnings about the dangers of cigarette smoking and that this negligence proximately caused Palmer's death.

In response, Liggett filed a motion to dismiss all inadequate warning claims on the ground that they were preempted by the Act. After a thorough review of the record, Judge Mazzone denied Liggett's motion to dismiss. The court concluded that "Congress [could not have] meant, by its silence on the issue of common law claim preemption, to do away with all means

of obtaining compensation for those hurt by inadequate cigarette warnings in advertising." *Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171, 1173 (D. Mass. 1986). The District Court also relied heavily on the analysis contained in Judge Sarokin's opinion in the District Court decision of *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146 (D.N.J. 1984), since reversed, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S. Ct. 907, 93 L.Ed.2d 857 (1987).

Because Judge Mazzone found the preemption issue to involve "a controlling question of law," 28 U.S.C. § 1292(b), he certified *sua sponte* this issue for interlocutory appeal, which we have accepted. Upon application by Liggett to this court, the proceedings below have been stayed while this limited appeal comes to us.

The Act

The District Court, the defendants, and the plaintiffs agree that the issue of the Act's preemptive force controls the disposition of virtually the entire case. If the Labeling Act is found to preempt state law actions, either expressly or impliedly, the Palmers lose. If Congress did not intend for the Act to be so preemptive, Liggett loses the appeal. The line thus drawn, we proceed now to a discussion of how Congress constructed the Labeling Act.

In 1964, the Surgeon General released the now famous "Smoking and Health: Report of the Advisory Committee to the Surgeon General." That initial report was one of the first official, scientifically approved statements linking cigarette smoking to lung cancer, bronchitis, and emphysema. The public response was immediate and vocal; clearly, some form of governmental action was imminent.

In a rush to protect and inform its citizens, several states proposed and adopted mandatory warning labels for cigarette packages to be sold in their individual states.[1] Given the

[1] For example, the New York state legislature adopted the following label in June 1965: "WARNING: Excessive Use Is Dangerous To Health." *Laws of New York 1965*, Ch. 470.

potential maze of conflicting state regulations, Congress stepped in in 1965 to set up a uniform, nationally consistent system of warning labels for cigarettes. Further, it did so with the express intention of striking a balance between its concern for the national health policy of smoking education and its protection of the trade and commerce aspects of the tobacco industry.[2]

After much internal and external debate, with classic confrontations between North and South, rural and urban states, together with vigorous lobbying by all forms of interested groups and businesses, the members of Congress negotiated a hard-fought compromise with the passage of the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965), codified as amended by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) at 15 U.S.C. §§ 1331 *et seq*. In 1984, Congress further amended the Act by the Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984).[3]

This case, like so many we are called on to decide, turns on a question of statutory construction and interpretation. It is by definition a frustrating task, for if the law's meaning is truly "plain" enough or its effect clear-cut enough, there is no need for us to pronounce what we discern its meaning or effect to be. In cases such as this one, however, we must marshal support from the ready arsenal of the canons of statutory construction to declare soberly the deconstructed meaning of the *omission* by Congress of a savings clause, "because Congress knew how to provide a savings clause when it wanted to." We are expected to "discover" the true congressional intent of the phrase "No requirement shall be imposed under State law," yet we are limited to contradictory, even self-serving language from the statute's legislative history to discern that intent.

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[2] At the time the Act was originally adopted, tobacco ranked third in agricultural export products, fifth among all cash crops, and supported some 750,000 farming families. *See* 111 *Cong. Rec.* 13,950, 13,898 (1965) (remarks of Sens. Ervin and Bass).

[3] The amendments enacted in 1984 took effect after Joseph Palmer's death, and therefore are not relevant in this case.

Nevertheless, that is the task assigned to us, and having acknowledged the inherently unsatisfying nature of it, we come now to the actual words of the law. In some ways, the Act is more straightforward in declaring its intent and effect than are many other analogous regulatory schemes. The Act contains three sections that address the preemption issue raised here. First is § 1331, the Act's declaration of policy and purpose.

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby –
>
> (1) The public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331.[4]

Second, § 1333 prescribes the exact label of warning to be placed on each package of cigarettes.[5] The language imposing this mandatory warning is as follows:

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[4] Subparagraph (1) of § 1331 was amended in 1984 to read:

> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and . . .

15 U.S.C. § 1331(1) (West Supp. 1987).

[5] The very fact that Congress mandated the precise wording required in a label, rather than merely establishing the "minimum requirements" standard

(footnote continued)

> It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.

15 U.S.C. § 1333.[6]

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often found in labeling acts distinguishes the Act from cases relied upon by the court and the Palmers as persuasive authority. *See, e.g., Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.) (involving FIFRA minimum labeling standards), *cert. denied*, 469 U.S. 1062, 105 S. Ct. 545, 83 L.Ed.2d 432 (1984), and discussion *infra* at note 13.

[6] When Congress originally enacted the Act in 1965, and when the link to the hazards of smoking was less firmly established, the warning was a more moderate statement: "Caution: Cigarette Smoking May Be Hazardous to Your Health." Pub. L. No. 89-92, § 4, 79 Stat. 282, 283 (1965).

In 1984, Congress extensively revised the labeling requirements that were in force under the 1969 amendments. Although the 1969, not 1984, warnings are controlling in this case, the Palmers have relied upon the most recent amendments as evidence of the inadequacy of the prior warnings. For information purposes, we set them out below:

> [1] *SURGEON GENERAL'S WARNING:* Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.
>
> [2] *SURGEON GENERAL'S WARNING:* Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.
>
> [3] *SURGEON GENERAL'S WARNING:* Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight.
>
> [4] *SURGEON GENERAL'S WARNING:* Cigarette Smoke Contains Carbon Monoxide.

15 U.S.C. § 1333(a)(1) (West Supp. 1987).

Finally, § 1334 sets out the section most relevant to our preemption analysis — the preemption section:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334.[7]

The remainder of the Act includes sections that prohibit radio and television advertising (§ 1335), require manufacturers to report cigarette ingredients to the Secretary of the Department of Health and Human Services (§ 1335a), and require the HHS Secretary to report to Congress annually about developments in "the current information in the health consequences of smoking" (§ 1337). Further, § 1337 also requires the Federal Trade Commission to report to Congress regarding its opinions on the effectiveness of cigarette labeling and the impact of advertising and marketing, along with any recommendations the FTC may desire to make. Sections 1338 and 1339 confer jurisdiction on the District Courts to enjoin violations of the Act, and provide for criminal penalties of not more than $10,000.

The Preeminence of Preemption

Having set out the relevant portions of the Act, we now consider the preemptive force that it brings to bear on the Palmers' state-based tort claim.

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[7] Section 1334(b) of the original 1965 Act read as follows:

> No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

The different forms of preemption are usually summarized by neat citations to familiar Supreme Court authority. Although we are somewhat wary that these ready citations list, but do not describe, and catalog, but do not define, any real distinctions among the various types of preemption, we nevertheless offer the following recitation from the Court in *Louisiana Public Service Comm'n v. Federal Communications Comm'n*, 476 U.S. ____, 106 S. Ct. 1890, 90 L.Ed.2d 369 (1986).

> The Supremacy Clause of Article VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S. Ct. 1305, 51 L.Ed.2d 604 (1977), when there is outright or actual conflict between federal and state law, *e.g.*, *Free v. Bland*, 369 U.S. 663, 82 S. Ct. 1089, 8 L.Ed.2d 180 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S. Ct. 1210, 10 L.Ed.2d 1082 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890, 77 L.Ed.2d 490 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S. Ct. 1146, 91 L.Ed. 1447 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 61 S. Ct. 399, 85 L.Ed. 581 (1941).
>
> * * *
>
> The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law.

476 U.S. at ____, 106 S. Ct. at 1898-99, 90 L.Ed.2d at 381-82.

The District Court Opinion

In its thoughtful and detailed scrutiny of this case, the District Court considered at length the reasoning in the three major opinions rendered to date in these cigarette products liability cases – the two *Cipollone* decisions, 593 F. Supp. 1146 (D.N.J. 1984) (Sarokin, J.), *rev'd*, 789 F.2d 181 (3d Cir. 1986) (Hunter, J.), *cert. denied*, __ U.S. __, 107 S. Ct. 907, 93 L.Ed.2d 857 (1987), and *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189 (E.D. Tenn. 1985). The Third Circuit and *Roysdon* courts held that the Act preempted state law tort claims, while the District Court in *Cipollone* held the claims were not preempted.

After reviewing the basic approaches to preemption analysis, the District Court considered and rejected the argument that either express or any of the forms of implied preemption were present in this case. We reverse and hold that the Act impliedly preempts the Palmers' claim.

Judge Mazzone first discussed express preemption. Because that type of preemption has been so strictly construed in the past, and because of the strong presumption against preemption, *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 2128, 68 L.Ed.2d 576, 595 (1981), it is unnecessary to disturb the court's conclusion that there is no express preemption present. Because we have no hesitation in determining that the Act impliedly preempts (under whatever rubric) the Palmers' claim, we need not overturn the District Court's view that the preemption section of the Act does not *explicitly* enough preempt state-based claims to be "expressly " preemptive.

The parties have focused their express preemption arguments on vigorous debates over the significance of the fact that there is neither a clause explicitly preempting state claims[8] nor a "savings clause" expressly preserving them.[9] Rather than wade into

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[8] *See, e.g.*, Copyright Act of 1976, 17 U.S.C. § 301(a); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a) & (c)(1); Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. §§ 1715z-17(d), 1715z-18(e).

[9] *See, e.g.*, Copyright Act of 1976, 17 U.S.C. § 301(b); Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(4).

the bog of doublespeaking legislative history to divine congressional intent from words *not* used, we simply acknowledge that the preemption section reads "no requirement . . . shall be imposed under State law," not "State-based tort claims are hereby preempted."[10]

The opinion next discusses the subtypes of implied preemption. Although the District Court broke down implied preemption into four categories — occupation of the field, conflict, impossibility, and frustration of purpose, we do not find such labels necessarily helpful, and certainly do not deem them determinative in ascertaining preemption. Rather, the gist of preemption is whether Congress (expressly) did or (impliedly) meant to displace state law or state law concepts in enacting the federal law. Thus, instead of attempting to fit the Act into some precast mold of "impossibility" or "frustration," we look to the effect the Palmers' suit will[11] have on the federal scheme set up by Congress. If the state law disturbs too much the congressionally declared scheme — whether denominated as "occupying the field" or "actually conflicting with federal law" — it will be displaced through the force of preemption.

In this case, Congress has eased our task of figuring out its intent by including both a statement of purpose and a preemption section. Because the language of the Act is straightforward and unambiguous, we need not resort to legislative history to determine congressional intent. "Reliance on legislative history in divining the intent of Congress is, as has often been observed, a step to be taken cautiously." *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 75, 102 S. Ct. 1534, 1540, 71 L.Ed.2d 748, 759 (1982); *New England Power Co. v. New Hampshire*,

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[10] As part of its express preemption discussion, the court held that compensatory damages could not act as extra-statutory "regulation," so as to be expressly preempted. We need not decide whether such damages constitute express or implied preemption. Rather, as we discuss *infra* at 18-19, we simply note here that, contrary to the District Court's conclusion, we do view compensatory damages as potentially regulatory in nature.

[11] The harm of the state law on the federal scheme should be actual, not potential. *See Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102 S. Ct. 3294, 3298, 73 L.Ed.2d 1042, 1049-50 (1982).

455 U.S. 331, 342, 102 S. Ct. 1096, 1102, 71 L.Ed.2d 188, 197 (1982); *Piper v. Chris-Craft Industries*, 430 U.S. 1, 26, 97 S. Ct. 926, 941, 51 L.Ed.2d 124, 143 (1977).

In adopting the Act, Congress explicitly announced a two-pronged purpose. It plainly sought to inform the public that "cigarette smoking may be hazardous to health by inclusion of a warning to that effect." The educational purpose, however, was tempered by a consideration that "commerce and the national economy . . . [be] protected to the maximum extent consistent with this declared policy." Further, commerce was to be unimpeded by "diverse, nonuniform and confusing cigarette labeling" regulations. 15 U.S.C. § 1331(1) & (2). Stated differently, in drafting the Act, Congress had two policies – health protection (through education) and trade protection – to implement, but only one purpose: to strike a fair, effective balance between these two competing interests. The result is an Act that "represents a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy." *Cipollone*, 789 F.2d at 187.

It is these policies, and more importantly, the balance fixed between them that is our focus. The language of § 1331 even measures the relative weight of the policies: the federal warning should protect commerce "to the maximum extent" consistent with its health policy. Thus, we consider now the effect of the introduction of a state tort claim into this congressionally calibrated system. As discussed earlier, Congress ran a hard-fought, bitterly partisan battle in striking the compromise that became the Act. It is inconceivable that Congress intended to have that carefully wrought balance of national interests superseded by the views of a single state, indeed, perhaps of a single jury in a single state. Contrary to the District Court's view, we therefore hold that a suit for damages on a common law theory of inadequate warning – if the warning given complies with the Act – disrupts excessively the balance of purpose set by Congress, and is thus preempted.

To permit the interposition of state common law actions into a well-defined area of federal regulation would abrogate utterly

the established scheme of health protection as tempered by trade protection. The Supremacy Clause of the Constitution, as enforced through the doctrine of preemption, prohibits this.

The Remaining Contentions

Having held that the Act impliedly preempts the Palmers' suit because it disturbs the federally calibrated balance of national interests, we briefly address other issues discussed by the District Court or raised by the Palmers on appeal.

First, the Palmers argue, and the District Court agreed, that to prohibit such state-based tort suits would effectively – and wrongly – leave plaintiffs like the Palmers without any remedy for their injuries. Relying on Justice White's statement in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615, 78 L.Ed.2d 443 (1984) that, "it is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct," 464 U.S. at 251, 104 S. Ct. at 623, 78 L.Ed.2d at 454, the Palmers argue that allowing the Act to preempt traditional state tort compensation, an area traditionally left to the states for regulation, is an impermissible overreading of the Act.

We reject this argument for several reasons. First, cigarette smoking, at least initially, is a voluntary activity. In the cases relied on by the Palmers in which state remedies were not preempted, the victims had little or no choice in their participation in the regulated fields. *See, e.g., Silkwood* (nuclear energy development); *United Construction Workers v. LaBurnum Construction Corp.*, 347 U.S. 656, 74 S. Ct. 833, 98 L.Ed. 1025 (1959) (employment). Second, the Supreme Court has often left parties without a remedy by finding state common law preempted. *See Chicago & NW Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S. Ct. 1124, 67 L.Ed.2d 258 (1981) (finding that the Interstate Commerce Act preempts state common law action for damages against a regulated railroad); *Farmers Union v. WDAY*, 360 U.S. 525, 79 S. Ct. 1302, 3 L.Ed.2d 1407 (1959) (finding that the Federal Communications Act preempts state libel claim against a radio station). There is no constitutional requirement that a federal law cutting off state remedies "either

duplicate the recovery at common law or provide a reasonable substitute remedy." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88, 98 S. Ct. 2620, 2638, 57 L.Ed.2d 595, 620 (1978).

The Palmers also contend, and the District Court agreed, that "the effect of compensatory awards on defendants' behavior is indirect and not regulatory in nature." We reject this characterization.

The preemption clause of the Act expressly prohibits "state law," not merely "statutory law" from imposing any "requirement or prohibition" different from the Act's warning label. 15 U.S.C. § 1334. If a manufacturer's warning that complies with the Act is found inadequate under a state tort theory, the damages awarded and verdict rendered against it can be viewed as state regulation: the decision effectively compels the manufacturer to alter its warning to conform to different state law requirements as "promulgated" by a jury's findings

More than that, the practicalities of modern litigation would inevitably involve conflict between the congressionally ordained warning and the common law label argued for by the plaintiffs. A trial court would not merely submit the question of whether the warning was adequate. Evidence pro and con would have to be offered, including specific examples of what sort of warning reasonably was called for, how it was to be given, and the like. Following the close of evidence, the trial court would have to submit the issue to the jury. In a federal court — as is this case — the judge, either under a general charge or one on special interrogatories under F. R. Civ. P. 49(a), would have to submit the question of warning with precision. This would be necessary so that a reviewing court could determine whether or not the warning fixed by the jury conflicted with the statutory warning. This challenge to the federal warning label's sufficiency — and the confusion it would engender — surely contravenes the Act's policy of uniform labeling.

The District Court held that an award of damages "would have only an indirect effect on defendant's labeling and advertising practices." 633 F. Supp. at 1177. The Palmers disingenuously

maintain that any monetary damages awarded would not compel a manufacturer to change its label for, after all, "the choice of how to react is left to the manufacturer." This "choice of reaction"seems akin to the free choice of coming up for air after being underwater. Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability. The most obvious change it can take, of course, is to change its label. Effecting such a change in the manufacturer's behavior and imposing such additional warning requirements is the very action preempted by § 1334 of the Act. Indeed, it arrogates to a single jury the regulatory power explicitly denied to all fifty states' legislative bodies.

Further, the Supreme Court itself has long acknowledged this power.

> [R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247, 79 S. Ct. 773, 780, 3 L.Ed.2d 775, 784 (1959). Thus, the regulatory effect of the Palmers' claim is direct, and must be preempted by the Act.

In addition, given the substantial differences in subject matter, we dismiss as unpersuasive the analogies made by the Palmers and the District Court to the *Silkwood* case. The District Court evidently believed that *Garmon*'s reasoning had been discredited by the Supreme Court's decision in *Silkwood* — even though nothing in *Silkwood* even remotely suggests that *Garmon* has been qualified or overruled, and even though the Court in *Silkwood* stated that federal law will "preempt the recovery of damages based on state law" whenever "imposition of a state standard in a damages action would frustrate the objectives of the federal law." 464 U.S. at 256, 104 S. Ct. at 626, 78 L.Ed.2d at 457-58.

First, the District Court did not even mention the fact that the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.*, at issue in *Silkwood*, contains no preemption provision whatever. Moreover, while the Atomic Energy Act has been read by the Supreme Court by implication to confer exclusive federal jurisdiction to regulate issues of nuclear safety, the Act also expressly reserves significant authority to the states.[12]

In contrast, the "comprehensive Federal program" established by the Act contains a sweeping preemption provision, and conspicuously fails to provide *any* role for the states in the area of cigarette labeling and advertising. Further, the enactment and legislative history of the Atomic Energy Act, as amended by the Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576, make clear Congress' explicit judgment that state common law damage actions for injuries caused by nuclear operations should be permitted to continue. *See Silkwood*, 464 U.S. at 251-56, 104 S. Ct. at 623-25, 78 L.Ed.2d at 454-57. For that reason, it was the starting place in *Silkwood*, and common ground among all the parties (as well as among all the Justices of the Supreme Court), that state common law damage actions were *not* preempted; the only issue was the much more refined question of whether *punitive* damages (as opposed to compensatory damages) were preempted. The Court's 5-4 decision — that punitive damages were not preempted — was based on the unremarkable conclusion that such damages are part and parcel of the "traditional state tort law" that Congress had decided to preserve within the AEA's regulatory scheme. *Id.* at 255, 104 S. Ct. at 625, 78 L.Ed.2d at 457.

Silkwood thus took for granted the answer to the issue that is the central controversy here. It therefore sheds no light at all on the fundamental question in this case — whether state

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[12] *See, e.g.*, 42 U.S.C. § 2018 (AEA does not affect state authority with respect to generation, sale, or transmission of electric power through use of federally-licensed nuclear facilities); 42 U.S.C. § 2021(b) (federal-state agreements authorized so that states may assume regulatory authority over certain nuclear materials); 42 U.S.C. § 2021(k) (section does not affect state authority to regulate activities for purposes other than protection against radiation hazards).

common law damage actions based on alleged failure to provide adequate warnings are permissible in the first instance.[13]

The Last Puff

Accordingly, having dismissed the Palmers' arguments against preemption as meritless, and having determined the effects of state tort liability to be seriously disruptive to the congressionally calibrated balance of national interests, we hold the Palmers' state-based claim of inadequate warning to be preempted by the Act. The decision of the District Court must be reversed and remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

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[13] The only preemption case cited by the District Court was *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062, 105 S. Ct. 545, 83 L.Ed.2d 432 (1984), in which the Court of Appeals held that Maryland tort claims were not preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.* FIFRA, which applies to some 40,000 different herbicide and pesticide formulations, imposes an entirely different type of regulatory scheme from that established under the Act. *See* 16 Env't Rep. (BNA) 9 (May 3, 1985). Under FIFRA, each manufacturer drafts a warning label for each product for EPA approval. Thus, two manufacturers of the same regulated product may use different labels of their own choosing, provided only that they obtain prior EPA approval. Further, the statute in *Ferebee* permits "states to impose more stringent constraints on the use of EPA-approved pesticides than those imposed by the EPA," indicating that Congress was indifferent to regulation of these products through state tort law. *Ferebee*, 736 F.2d at 1541. In contrast, the Act explicitly (i) applies to cigarettes only; (ii) mandates the precise language of the label; and (iii) prohibits any state from regulating any aspect of cigarette warnings. The analogy to *Ferebee* must fail.

Judgment of the District Court,
dated October 7, 1987

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANN M. PALMER, as Administratrix of the Estate of Joseph C. Palmer, and ANN M. PALMER and DAPHNE S. PALMER,

Plaintiffs,

—v.—

LIGGETT GROUP INC. and LIGGETT & MYERS TOBACCO CO., INC.,

Defendants.

Civil Action No. 83-2445-MA

JUDGMENT

MAZZONE, D.J.

In accordance with the Court's allowance of the defendants' motion for entry of judgment on October 6, 1987 in the above entitled action, it is hereby ORDERED

Judgment for the defendants.
Complaint dismissed.

By the Court,

October 7, 1987

/s/ Helen M. Costello
Deputy Clerk

**Order of the Court of Appeals,
dated April 11, 1988**

ANN M. PALMER, as Administratrix of the Estate of
Joseph C. Palmer, and ANN M. PALMER
and DAPHNE S. PALMER,

Plaintiffs-Appellees,

—v.—

LIGGETT GROUP INC. and
LIGGETT & MYERS TOBACCO CO., INC.,

Defendants-Appellants.

No. 88-1195

United States Court of Appeals,
First Circuit

ORDER OF COURT

Entered: April 11, 1988

Upon consideration of "appellants' Motion To Substitute Real Parties In Interest As Appellees" and without opposition,

It is ordered that the motion be granted and the case caption be reformed so that the appellees are Public Citizen, Et Al, appellees.

By the Court:

/s/ Francis P. Scigliano

Clerk.

Handwritten Order of the District Court accompanying Motion of Public Citizen et al. to Order Filing and to Modify Protective Order, dated January 28, 1988

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANN M. PALMER, as Administratrix of the Estate of Joseph C. Palmer, and ANN M. PALMER and DAPHNE S. PALMER,

Plaintiffs,

—v.—

LIGGETT GROUP INC. and LIGGETT & MYERS TOBACCO CO., INC.,

Defendants.

Civil Action No. 83-2445-MA

MOTION OF PUBLIC CITIZEN, AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AND AMERICAN PUBLIC HEALTH ASSOCIATION TO ORDER FILING OF DISCOVERY MATERIALS AND TO MODIFY PROTECTIVE ORDER

Public Citizen, the American Cancer Society, the American Heart Association, the American Lung Association, and the American Public Health Association (the "movants") respectively move the Court to enter an order directing the parties to file all materials obtained in discovery with the Clerk and to modify the protective order entered by this Court on 25 February 1985 in order to permit greater public access to these materials. The memorandum of law accompanying this motion explains more

fully the reasons for seeking this relief, which is authorized specifically under Rule 16(g) of the Rules of this Court.

Respectfully submitted,

/s/ Carolyn Grace

Carolyn Grace

Shapiro & Grace
79 Milk Street
Boston, Mass. 02109
(617) 451-2155

/s/ Cornish F. Hitchcock

Cornish F. Hitchcock
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Public Citizen *et al.*

December 1987

MOTION ALLOWED, for reasons stated at hearing.

/s/ A. David Mazzone

U.S.D.J.
1/28/88

Handwritten Order of the District Court accompanying Motion of Public Citizen et al. to Order Parties to Maintain Discovery Materials, dated December 28, 1987

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANN M. PALMER, as Administratrix of the Estate of Joseph C. Palmer, and ANN M. PALMER and DAPHNE S. PALMER,

Plaintiffs,

—v.—

LIGGETT GROUP INC. and LIGGETT & MYERS TOBACCO CO., INC.,

Defendants.

Civil Action No. 83-2445-MA

MOTION OF PUBLIC CITIZEN, AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AND AMERICAN PUBLIC HEALTH ASSOCIATION TO ORDER PARTIES TO MAINTAIN AND NOT TO DESTROY OR RETURN DISCOVERY MATERIALS

Public Citizen, the American Cancer Society, the American Heart Association, the American Lung Association, and the American Public Health Association (the "movants") respectively move the Court to enter an order directing the parties to maintain intact and not to destroy or return to opposing counsel the discovery materials in this case. As explained in the attached memorandum, this relief is sought because counsel for the parties must destroy or return these materials within 45 days from the conclusion of this litigation under the terms of a protective order entered by this Court on 25 February 1985, and the deadline is rapidly approaching.

Movants seek this relief on an expedited and *ex parte* basis under Local Rule 16(g), which allows a party or non-party seeking to litigate issues about the filing and public availability of discovery materials to do so by seeking an *ex parte* order. Movants make this motion in order to preserve the status quo pending this Court's resolution of a separate motion that they are filing today which asks the Court to direct that these discovery materials be filed with the Clerk and that the protective order be modified to permit public access to many of these documents.

Movants will be irreparably injured absent such interim relief, since the parties may destroy the records, thus rendering this issue moot. By contrast, granting this motion will cause no injury to the parties, since it requires only that they "do nothing" with the documents while movants' other motion is litigated to conclusion. Moreover, the importance of the issues in this case with respect to public health and safety also requires granting the requested relief.

We note that granting this motion will allow the parties adequate time to respond to movants' other motion, which focuses on modification of the underlying protective order. Granting this motion will allow that issue to be litigated and decided by this Court in an orderly way, and we submit that for this reason also, the interim relief sought in this motion should be allowed.

Movants are making this motion on an *ex parte* basis, as contemplated by Local Rule 16(g), and we note that the Supreme Court has decided the merits of similar non-party motions for access to court records or proceedings, *e.g.*, *Press-Enterprise Co. v. Superior Court*, 106 S. Ct. 2735 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), as did the Second Circuit in a recent case raising these same issues, *In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139, *cert. denied*, 108 S. Ct. ____ (1987). Movants thus submit that intervention is not a prerequisite here, but they would ask the Court to grant them intervenor status if the Court should conclude otherwise, and we note that intervention appears to have been routinely granted in these situations in this circuit. *E.g.*, *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986); *In re Globe Newspaper*

Co., 729 F.2d 47, 50 (1st Cir. 1984); *In re San Juan Star Co.*, 662 F.2d 108, 113 (1st Cir. 1981). Movants appeared as *amici curiae* in the court of appeals, and their interest is set forth in their motion to appear there, a copy of which is attached. That they meet the other requirements for intervention will be demonstrated in the memoranda they are filing today.

Accordingly, for these reasons and those set forth in the accompanying memorandum, movants respectfully ask the Court to preserve the *status quo* by ordering the parties to maintain intact and not to destroy any discovery materials while this issue is being litigated. For the convenience of the Court, a proposed form of order is attached.

Respectfully submitted,

/s/ Carolyn Grace

Carolyn Grace

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(617) 451-2155

/s/ Cornish F. Hitchcock

Cornish F. Hitchcock
Alan B. Morrison

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Attorneys for Public Citizen *et al.*

December 1987

MOTION ALLOWED.

/s/ A. David Mazzone

U.S.D.J.
12/28/87

Handwritten Order of the District Court accompanying Defendants' Motion for Entry of Judgment, dated October 6, 1987

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANN M. PALMER, as Administratrix of the Estate of Joseph C. Palmer, and ANN M. PALMER and DAPHNE S. PALMER,

Plaintiffs,

—v.—

LIGGETT GROUP INC. and LIGGETT & MYERS TOBACCO CO., INC.,

Defendants.

Civil Action No. 83-2445-MA

MOTION AND MEMORANDA FOR ENTRY OF JUDGMENT IN FAVOR OF LIGGETT GROUP INC. AND LIGGETT & MYERS TOBACCO CO., INC.

Defendants Liggett Group Inc. and Liggett & Myers Tobacco Co., Inc. ("Liggett"), pursuant to the Mandate of the Court of Appeals for the First Circuit, move for an order dismissing the Complaint of Plaintiffs Ann Palmer, individually and as administratrix of the Estate of Joseph C. Palmer, and Daphne S. Palmer ("the Palmers") and entering a judgment in Liggett's favor.

On August 25, 1987, the Court of Appeals for the First Circuit reversed this Court's prior ruling concerning the preemptive effect of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§1331-1341. The First Circuit stated:

> This interlocutory appeal presents one highly disputed issue: whether the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §1331 *et seq.* (the Act), preempts the Palmers' smoking and health related claims that challenge either the adequacy of the

> federal warning on cigarette packages or the propriety of Liggett's advertising and promotion of cigarettes. In deference to the congressional declaration that (i) cigarettes be labeled uniformly and (ii) a balance be struck between the priority given to tobacco commerce and to our national health policy, we hold that the Act does preempt the Palmers' state law claims, and reverse the decision of the District Court.
>
> * * *
>
> The District Court, the defendants and the plaintiffs agree that the issue of the Act's preemptive force controls the disposition of virtually the entire case. If the Labeling Act is found to preempt state law actions, either expressly or impliedly, the Palmers lose. If Congress did not intend for the Act to be so preemptive, Liggett loses the appeal.

Palmer v. Liggett Group Inc., Docket No. 86-1525 (1st Cir. August 25, 1987) Slip op., at 2, 5.

Each of the Palmers' claims challenges either the adequacy of the federally mandated warning or the propriety of Liggett's promotion of cigarettes and is therefore preempted. Liggett therefore requests an order which dismisses the Palmers' complaint and the entry of judgment in Liggett's favor.

LIGGETT GROUP INC. and
LIGGETT & MYERS TOBACCO CO., IN

By their attorneys,

/s/Joseph J. Leghorn

Samuel Adams
Joseph J. Leghorn
Deborah K. Blum
WARNER & STACKPOLE
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MOTION ALLOWED.

/s/ A. David Mazzone

U.S.D.J.
10/6/87

Handwritten Order of the District Court accompanying Plaintiffs' Motion for Reconsideration, dated August 12, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANN M. PALMER, as Administratrix of the Estate of Joseph C. Palmer, and ANN M. PALMER and DAPHNE S. PALMER,

Plaintiffs,

—v.—

LIGGETT GROUP INC. and LIGGETT & MYERS TOBACCO CO., INC.,

Defendants.

Civil Action No. 83-2445-MA

PLAINTIFF'S MOTION FOR RECONSIDERATION OF THIS COURT'S DENIAL OF PLAINTIFF'S MOTION FOR CLARIFICATION OF THE PROTECTIVE ORDER ISSUED FEBRUARY 25, 1985

PLEASE TAKE NOTICE that the Plaintiffs hereby move this Honorable Court that it reconsider its order denying the Plaintiff's Motion for Clarification, or in the Alternative Modification of the Protective Order Issued February 25, 1985. The Plaintiffs respectfully request that this Court modify the protective order entered in this case by striking paragraph 2 of said order and limiting the application of the order to those documents that are prospectively designated confidential by the Defendants.

AS GROUNDS IN SUPPORT THEREOF, the Plaintiffs state that at the time this matter was submitted to this Court, the Plaintiffs were unaware that a protective order similar to the one submitted by the Defendants in this case and which the Defendants had submitted to the District Court for the District of New Jersey in *Rose D. Cipollone, et. al.* v. *Liggett Group, et. al.*, No. 83-2864 was under consideration in that Court. In

an opinion and order dated July 17, 1985 (Exhibit "A" & "B"), District Judge Sarokin ruled that so much of the New Jersey Order prohibiting the public availability of non-confidential materials was both overly broad and inconsistent with the First Amendment to the Constitution of the United States.

The Plaintiffs submit that this Court may desire to reconsider its ruling to the extent this Court relied upon the Defendants' representation in its submissions that two other Courts ". . . [had] also issued essentially identical orders in cases in which claims are made against companies in the cigarette industry." (Defendants' Motion ¶7). While the Defendants included in their citation to the *Cipollone* case the fact that an appeal to District Judge Sarokin was pending, they did not indicate that an opinion was imminent. Had the Plaintiffs been aware that an opinion on this very issue was about to be released, they would have requested that this Court defer it's [*sic*] ruling until the opinion was released.*

The Plaintiffs recognize that the order of the New Jersey Federal Court is not controlling here. However, to the extent that this Court gave any weight to the fact that other courts had ruled in Defendants' favor, such deference is no longer appropriate. Moreover, in view of the fact that the non-confidential documents at issue here are now available to the public and will be disseminated to the media, there is not rational justification for the continued protection of this material by this Court.

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* As it were [*sic*], this Court entered its ruling on July 16, 1985 and Judge Sarokin released his ruling on July 17, 1985.

Accordingly, Plaintiffs respectfully request that this Court allow the Plaintiffs' Motion for Reconsideration and enter a protective order in the form entered in *Cipollone, et. al.*, v. *Liggett Group, Inc., et. al., supra.*

By their attorneys,

NIX & POTTERS

/s/Robert S. Potters

Robert S. Potters
Nix & Potters
Sixty State Street
Boston, Massachusetts 02109
(617) 227-0101

DATED: July 23, 1985

MOTION DENIED, WITHOUT PREJUDICE TO RENEW. The Sarokin opinion [*sic*] is now under appeal. This motion should be renewed following a ruling by the Third Circuit Court of Appeals.

/s/ A. David Mazzone

U.S.D.J.
8/12/85

Handwritten Order of the District Court accompanying Proposed Intervenor's Motion for Reconsideration, dated August 12, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANN M. PALMER, as Administratrix of the Estate of Joseph C. Palmer, and ANN M. PALMER and DAPHNE S. PALMER,

Plaintiffs,

—v.—

LIGGETT GROUP INC. and LIGGETT & MYERS TOBACCO CO., INC.,

Defendants.

Civil Action No. 83-2445-MA

(Oral Argument Requested)

MOTION FOR RECONSIDERATION OF PROPOSED INTERVENOR, THE WALL STREET JOURNAL

The Wall Street Journal, by its publisher, Dow Jones & Company, Inc. (hereinafter "The Wall Street Journal") respectfully moves for reconsideration of the Court's Orders dated July 16 and July 19, 1985, by which the Court (1) denied The Wall Street Journal's Motion For Leave To Intervene On Limited Issue Of Plaintiffs' Motion for Clarification Or Modification Of Protective Order; (2) denied Plaintiffs' Motion For Clarification Or Modification Of Protective Order; and (3) allowed Defendants' Motion To Require Compliance With Protective Order. The grounds for this motion are as follows:

1. Subsequent to the Court's action on the above-described motions, The Wall Street Journal received notice and a copy of the Order and accompanying Opinion of the Honorable H. Lee Sarokin, United States District Judge for the District of New Jersey, filed on July 17, 1985, in the matter of *Cipollone, et al., v. Liggett Group Inc., et al..*, Civ. No. 83-2864. (Copies of Order and Opinion attached hereto.)

Judge Sarokin's Order and 29-page Opinion are submitted not only because they represent the most thorough analysis to date of the precise issues raised by the motions for which reconsideration is sought, but also because defendants have cited the now-vacated New Jersey protective order in support of the protective order at issue here. Defendants' Memorandum of Law In Support of Their Motion to Require Compliance with Protective Order, footnote at pp. 3-4; Appendix To Defendants' Motion To Require Compliance With Protective order, Ex. H.

In his Opinion, Judge Sarokin analyzed the impact of the Supreme Court's decision in *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199 (1984) on a protective order for all purposes identical to the one entered at defendants' behest in this action. Judge Sarokin concluded that:

> In *Seattle Times*, the Court held the first amendment clearly to be implicated, in light of the great degree of public interest in plaintiff Rhinehart, the leader of a religious group known as the Aquarian Foundation. Much greater is the public interest in this case, involving claims of liability against cigarette companies for failure to warn and other theories.

Sarokin Opinion at 14. Judge Sarokin observed that the Supreme Court itself has cited its decision in *Seattle Times* for the proposition that restrictions on such protected speech must "be no greater than necessary to protect the public interest." *Id.* at 17 (citing *Wayte v. United States*, 105 S. Ct. 1524, 1533 (1985)).

Judge Sarokin reviewed the protective order entered by the magistrate from the standpoint that "defendants must bear the burden of demonstrating the necessity for each provision of such

order." Sarokin Opinion at 20. As is true here, the reasons offered by the defendants in support of the New Jersey protective order were "quite conclusory" — that the protective order would streamline the discovery process, and that the information discovered might otherwise be used for some purpose not limited to the trial of the case at bar. *Id.* at 21. Accordingly, Judge Sarokin held that paragraph 2 of the New Jersey protective order, which was identical to paragraph 2 of the order at issue here,

> oversteps the bounds permitted by Rule 26(c), and consequently the first amendment, by limiting the flow of information without any cause whatsoever. The Order will accordingly be altered to cover only confidential information.

Id. at 22. As revised by Judge Sarokin, the New Jersey protective order now contains no restrictions on disclosure of discovered information unless it is first explicitly claimed to be, and then agreed by the parties or found by the court to be, "confidential". Sarokin Order, ¶¶ 2, 3.

Judge Sarokin further emphasized that the defendants would continue to bear the burden of showing "good cause" to restrict disclosure of information produced in discovery. Sarokin Opinion at 28.

> To conclude otherwise would unduly restrict the free flow of information mandated by the first amendment. In a case such as this in which the public has a substantial interest, the court is reluctant to inhibit such disclosure absent a showing that there is good cause to do so. What are the risks of smoking; what the tobacco industry knew of those risks; and what action it took or did not take with that knowledge are matters of great public concern. It is difficult to envision that any of those matters involve "secrets" in the traditional sense, worthy of protection against public scrutiny. Indeed they may be secrets in the sense that the industry would prefer them to remain confidential, but not in the sense that their concealment

> from the press and public would be consistent with the first amendment.
>
> Litigants are entitled to prove that information released through the compulsion of discovery proceedings should not be made public, and they are afforded the opportunity to do so. However, absent such a showing, information gleaned through discovery should be made available, particularly when the subject matter pertains to issues which affect the health and well-being of millions of persons.

Id. at 28-29. In short, Judge Sarokin's Opinion recognized that the public's legitimate and immediate interest in receiving information that may affect its health and safety is protected by Rule 26(c) and the first amendment, and is not limited to that narrow subset of information that may eventually appear on the "public record" of a trial, assuming that a trial occurs.

2. In addition to Judge Sarokin's Opinion, The Wall Street Journal incorporates in this motion the analysis and legal authority set out in its memorandum of law filed in this action on July 16, 1985.

As discussed in that memorandum, The Wall Street Journal has standing to challenge portions of the protective order that, as interpreted by defendants, unduly restrict the free flow of information on a matter of consummate public interest. The earlier memorandum also argued that, in view of the fact that defendants selected the vague language of paragraph 2, as well as the remainder of the protective order, a fair construction of the order would limit its restrictions on disclosure to information designated "confidential." Finally, as discussed in the earlier memorandum, defendants' unsupported and conclusory declaration that dissemination of non-"confidential" documents produced by a non-party might embarrass them is of no weight whatsoever in determining whether defendants have shown "good cause" for restricting voluntary disclosure. There is simply no record in this case, despite defendants' ample opportunity to attempt to create one, on which "good cause" for the blanket

restrictions said by the defendants to reside in paragraph 2 can be found.

For all the foregoing reasons, this Court should grant plaintiffs' and The Wall Street Journal's motions for reconsideration, deny the defendants' previous motion and allow the previous motions of plaintiffs and The Wall Street Journal. The Wall Street Journal respectfully requests oral argument on its motion, and estimates that 45 minutes will be sufficient time for all parties to be heard.

By its attorneys,

/s/Bancroft Littlefield, Jr.

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Of Counsel:

Robert D. Sack
Robert H. Hammel
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30 Rockefeller Plaza
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(212) 541-4000

Dated: July 23, 1985

MOTION DENIED, WITHOUT PREJUDICE TO RENEW. This motion should be renewed following a ruling by the Third Circuit Court of Appeals.

/s/ A. David Mazzone

U.S.D.J.
8/12/85

Handwritten Order of the District Court accompanying The Wall Street Journal's Motion for Leave to Intervene, dated July 19, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANN M. PALMER, as Administratrix of the Estate of Joseph C. Palmer, and ANN M. PALMER and DAPHNE S. PALMER,

Plaintiffs,

—v.—

LIGGETT GROUP INC. and LIGGETT & MYERS TOBACCO CO., INC.,

Defendants.

Civil Action No. 83-2445-MA

MOTION FOR LEAVE TO INTERVENE ON LIMITED ISSUE OF PLAINTIFFS' MOTION FOR CLARIFICATION OR MODIFICATION OF PROTECTIVE ORDER

The Wall Street Journal seeks access to certain discovery material produced by Arthur D. Little Company (a non-party) in this tort action against a cigarette manufacturer.

Accordingly, The Wall Street Journal, by its publisher, Dow Jones & Company, Inc. (hereinafter The Wall Street Journal) moves, pursuant to Fed. R. Civ. P. 24(a), to intervene and be heard in the above action on the limited issue of Plaintiffs' Motion for Clarification or Modification of the Protective Order entered on February 25, 1985. The grounds for this motion, as more fully set out in the accompanying memorandum of law, are:

1. On June 14, 1985, plaintiffs' counsel notified the Court that it intended to disseminate to The Wall Street Journal certain

documents produced in discovery to plaintiffs by the Arthur D. Little Company in light of defendants' failure to designate such documents as confidential pursuant to the protective order. Defendants on June 28, 1985 moved to prevent such dissemination, asserting that the protective order prohibited such disclosure regardless of whether the documents were designated as confidential. Plaintiffs now move to clarify or modify the protective order so that they may disseminate the Arthur D. Little documents to The Wall Street Journal, on the grounds that (a) the order requires a party to designate a document "confidential" to obtain the restrictions on disclosure provided in the order, and defendants have not so designated the Arthur D. Little documents, and (b) if the order were to be read as imposing disclosure restrictions on all information produced or exchanged in the case regardless of whether good cause for such restriction were shown, the order would in this respect be contrary to law and should therefore be modified.

2. The Wall Street Journal has standing to be heard by the Court and to intervene on the limited issue of the validity of a Court order which under defendants' reading would have the effect of prohibiting plaintiffs from disclosing to The Wall Street Journal, as they have said they wish to do, documents which The Wall Street Journal seeks to review in a matter of great public interest.

3. The Wall Street Journal meets the requirements for intervention as of right of Rule 24(a)(2). The Wall Street Journal claims an interest relating to the transaction which is the subject of this action, and is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest. The interest of The Wall Street Journal is not adequately represented by the existing parties to this action.

The Wall Street Journal respectfully requests that the Court grant brief oral argument on the motion for intervention and for clarification and modification. The Wall Street Journal believes it will take no more than 45 minutes for all parties to the motion to be heard. The Wall Street Journal requests oral

argument because of the important issues at stake in the motion and because, if all parties are heard together, it may be possible to expedite a resolution.

By its attorneys,

/s/Bancroft Littlefield, Jr.

Bancroft Littlefield, Jr.
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(617) 482-1390

Of Counsel,

Robert D. Sack
Robert H. Hammel
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30 Rockefeller Plaza
New York, N.Y. 10112

Dated: July 16, 1985

MOTION DENIED. I have ruled on this issue. The public is entitled to the public record.

/s/ A. David Mazzone

U.S.D.J.
7/19/85

Handwritten Order of the District Court accompanying Plaintiffs' Motion for Clarification or Modification, dated July 16, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANN M. PALMER, as Administratrix of the Estate of Joseph C. Palmer, and ANN M. PALMER and DAPHNE S. PALMER,

Plaintiffs,

—v.—

LIGGETT GROUP INC. and LIGGETT & MYERS TOBACCO CO., INC.

Defendants.

Civil Action No. 83-2445-MA

PLAINTIFFS' MOTION FOR CLARIFICATION OR IN THE ALTERNATIVE FOR MODIFICATION OF THE PROTECTIVE ORDER ISSUED FEBRUARY 25, 1985

PLEASE TAKE NOTICE that Plaintiffs move this Honorable Court for a clarification of this Court's Protective Order dated February 25, 1985 with respect to the handling and designation of documents produced in the above captioned matter. In the alternative, pursuant to paragraph 16 of the Protective Order, Plaintiffs seek the modification of said Order.

As grounds therefor, plaintiffs state as follows:

1. On February 25, 1985, over plaintiffs' objections, this Court entered the Protective Order at issue herein.

2. Paragraphs 1 and 2 of said Order provide as follows:

> 1. All counsel and their employees shall be and are hereby prohibited and enjoined from disclosing to or

> otherwise discussing with any person any confidential information (as herein defined), except as provided hereafter.
>
> 2. All information produced or exchanged in the course of this civil action or any appeal arising therefrom (the "litigation") shall be used solely for the purpose of this case.

Paragraph 3 of the Order defines Confidential Information while paragraph 4 concerns the method for making such designations. Paragraphs 5 through 12 of the Order further deal with the designation, inspection and disclosure of confidential materials.

3. Since the entering of the Order the Defendants have failed to designate a single document as confidential.

4. Counsel for Plaintiffs have received a request from the Dow Jones & Company, Inc. requesting certain materials produced to Plaintiffs by Arthur D. Little Company Inc., a non-party to this action.

5. In response to that request Plaintiffs filed their Notice of Intent to Disseminate. After being informed that the Defendants intended to oppose that action, Plaintiffs agreed not to distribute any material until the Defendants responded and this Court made any necessary clarifications or modifications.

6. In response to Plaintiffs' Notice of Intent to Disseminate Documents, Defendants assert that paragraph 2 of the Protective Order categorically protects every document produced to Plaintiffs.

7. The provisions of paragraph 2 should be read in conjunction with the remaining paragraphs of the order so as to protect confidential information from being used for any purpose other that [*sic*] the trial of this case. To read paragraph 2 otherwise would provide a blanket protection without regard to whether the information "falls within the scope of confidential information under the Federal Rules of Civil Procedure and the precedents thereto." (See Paragraph 3 of Protective Order)

8. This Court's order issued pursuant to Rule 26 (c) is clearly designed to protect confidential information exchanged during the course of litigation. No broader purpose should be read into the terms of the Order.

9. The expansive reading that Defendants suggest is contrary to law and unsupported by any demonstration of "good cause." No factual support for Defendants' position has been offered or substantiated.

10. Plaintiffs are not seeking a trial by the media but are endeavoring to respond to a request by a media publication of the highest standards which desires to inform the public of the information contained in Arthur D. Little's research materials. This is not a case where documents could be used for an alternative purpose, such as harassment or ridicule. The documents are of an historical nature.

11. Plaintiffs have not disseminated any documents and have never intended to disregard, ignore, or otherwise act contrary to an Order of this Court. Plaintiffs filed their Notice of Intent to Disseminate in the good faith belief that the Order was limited in its application to confidential documents and that the use of these confidential documents was restricted to this case against the Defendants.

12. Clarification of this Court's order is in the interest of all parties to this action

13. In further support of this Motion for Clarification Plaintiffs intend to rely upon the Memorandum of Law they expect counsel for Dow Jones & Company, Inc. to file with this Court.

WHEREFORE, Plaintiffs seek clarification or in the alternative modification of the February 25, 1985 Protective Order.

By their attorneys,
Nix & Potters

/s/Daniel A. Shapiro

Robert S. Potters
Daniel A. Shapiro
60 State Street
Boston, Massachusetts
(617) 227-0101

July 12, 1985

REQUEST FOR ORAL ARGUMENT

The Plaintiffs request oral argument on their Motion for Clarification or in the Alternative for Modification, pursuant to Local Rule 12 (c), and request thirty minutes for both parties.

MOTION DENIED.

/s/ A. David Mazzone

U.S.D.J.
7/16/85

Handwritten Order of the District Court accompanying Defendants' Motion to Require Compliance with Protective Order, dated July 16, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANN M. PALMER, as Administratrix of the Estate of Joseph C. Palmer, and ANN M. PALMER and DAPHNE S. PALMER,

Plaintiffs,

—v.—

LIGGETT GROUP INC. and LIGGETT & MYERS TOBACCO CO., INC.,

Defendants.

Civil Action No. 83-2445-MA

MOTION TO REQUIRE COMPLIANCE WITH PROTECTIVE ORDER

Pursuant to Rules 26(c) and 37 of the Federal Rules of Civil Procedure, defendants Liggett Group Inc. and Liggett & Myers Tobacco Co., Inc. respectfully move this Honorable Court for an order:

(a) Directing plaintiffs and their attorneys to comply with the terms of paragraph 2 of a Protective Order of this Court dated February 25, 1985 (the "Protective Order") and not to disseminate to Dow Jones & Company, Inc., publishers of *The Wall Street Journal* ("Dow Jones") any of the documents produced to plaintiffs by Arthur D. Little, Inc. and not used at trial; and

(b) Finding that any dissemination or distribution to Dow Jones of any or all of the documents produced in this action by Arthur D. Little Inc. shall be a violation of the terms of Paragraph 2 of the Protective Order, and shall be an act in contempt of court subjecting the violator to punishment.

The facts supporting and grounds for this Motion are as follows:

1. Paragraph 2 of the Protective Order, a copy of which is attached as Exhibit A in the Appendix to Defendants' Motion to Require Compliance With Protective Order (the "Appendix"), provides as follows:

> All information produced or exchanged in the course of this civil action or any appeal arising therefrom (the "litigation") shall be used solely for the purpose of this case.

Paragraph 16 of the Protective Order further provides as follows:

> Any party may apply to this Court at any time, upon proper notice, for a modification of this Protective Order with respect to the handling or description of any document or for any other purpose.

2. Plaintiffs have never sought to utilize the provisions of Paragraph 16 by moving to modify or vacate any of the terms of the Protective Order, nor have they moved to reargue or appeal the Order.

3. Plaintiffs have twice sought and obtained protective orders whose provisions are virtually identical to those of the Protective Order and limiting the extrajudicial use of information obtained through discovery. *See* Plaintiffs' Motion for Protective Order, dated January 7, 1985, allowed by Order of the Court dated January 25, 1985 (Appendix Exhibit B); Stipulation and Protective Order dated January 17, 1984 (Appendix Exhibit C). The grounds used by plaintiffs to support their protective order was their counsel's claim that public disclosure of private material would cause "embarrassment and harrassment" [*sic*]. (Exhibit B ¶¶ 3-4).

4. By letter dated June 7, 1985 (Appendix Exhibit D), Foley, Hoag & Eliot, attorneys for Dow Jones, advised the Court that their client wished to obtain access to certain documents produced in discovery to plaintiffs. Implicit in the June 7, 1985 letter is Dow Jones' recognition that the Protective Order prohibits plaintiffs from unilaterally disseminating to Dow Jones any document produced in discovery and not used at trial or made part of the public record. By letter dated June 13, 1985 (Appendix Exhibit E), defendants' counsel advised Dow Jones that it had advised the Court that it would oppose such a motion.

5. Immediately thereafter, and in disregard of Paragraph 2 of the Protective Order, plaintiffs' counsel, in a document entitled "Notice of Intent to Disseminate Documents" (the "Notice of Intent") (Appendix Exhibit F), announced their intention to turn over to Dow Jones documents produced in this action by Arthur D. Little Inc. Plaintiffs' counsel further state in the Notice of Intent that only "intervening action by this Court" will prevent them from disseminating documents to the [*sic*] Dow Jones.

6. Dissemination to Dow Jones of documents received by plaintiffs in discovery is not the use of documents "solely for the purpose of this case" and thus violates Paragraph 2 of the Protective Order.

7. As demonstrated in the accompanying memorandum of law, it was within the discretion of the Court to enter the Protective Order restricting the use of discovered information to "solely for the purpose of this case." Not only has this Court ordered such restrictions on two other occasions at plaintiffs' request, other courts have also issued essentially identical orders in cases in which claims are made against companies in the cigarette industry. *See Barnes v. R.J. Reynolds*, Civ. Action No. 84-56 (D.N.J. Order docketed November 11, 1984); *Cipollone v. Liggett Group, Inc.*, Civ. Action No. 83-2864 (D.N.J. Order docketed April 1, 1985, Appeal to the District Court filed) (Appendix Exhibits G & H).

8. Plaintiffs' use of information obtained through the discovery process for purposes wholly unrelated to the prosecution of this

case would be an abuse of this Court's processes. The law clearly empowers this Court to prevent plaintiffs' counsel from conducting a media trial by feeding to the press selective material, obtained by plaintiffs in discovery ostensibly for the purpose of prosecuting their case. Further, it would also be inherently unfair to permit plaintiffs to obtain a protective order based solely on a claim that public disclosure of their records "may cause undue embarrassment and harrassment" [*sic*] and deny that same relief to defendants when they seek such protection based, in part, on the same grounds.

Accordingly, it is respectfully submitted that the instant motion to enforce the terms of the Protective Order be granted.

Dated: June 28, 1985

Webster & Sheffield

By: /s/ James V. Kearney

James V. Kearney
Co-Counsel for Defendants
1 Rockefeller Plaza
New York, New York 10020
(212) 957-9800

MOTION ALLOWED. The dissemination of this material will not aid in the fair trial of this case. The trial is public and the Wall Street Journal is, of course, able to attend the trial.

/s/ A. David Mazzone

U.S.D.J.
July 16, 1985

**Order of the District Court,
dated February 25, 1985**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANN M. PALMER, as Administratrix of the Estate of Joseph C. Palmer, and ANN M. PALMER and DAPHNE S. PALMER,

Plaintiffs,

—v.—

LIGGETT GROUP INC. and LIGGETT & MYERS TOBACCO CO., INC.,

Defendants.

Civil Action No. 83-2445-MA

PROTECTIVE ORDER

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, IT IS HEREBY ORDERED AND DECREED that:

1. All counsel and their employees shall be and are hereby prohibited and enjoined from disclosing to or otherwise discussing with any person any confidential information (as herein defined), except as provided hereafter.

2. All information produced or exchanged in the course of this civil action or any appeal arising therefrom (the "litigation") shall be used solely for the purpose of this case.

3. "Confidential information" as used herein means any information which is designated as "confidential," whether it be a document, information contained in a document, information revealed during a deposition or in any interrogatory answer or otherwise disclosed in discovery. Information shall be designated as confidential only upon the good-faith belief that the information falls within the scope of confidential information under the Federal Rules of Civil Procedure and the precedents thereto.

4. Documents containing confidential information shall be designated as confidential by placing the word "CONFIDENTIAL" or the following label (or a substantial equivalent) on the original of the document:

"CONFIDENTIAL"

"PAGES/PARAGRAPHS/LINES ____ THROUGH ____ OF THIS DOCUMENT ARE SUBJECT TO A COURT ORDER AND THIS DOCUMENT AND THEIR CONTENTS SHALL NOT BE USED, SHOWN OR DISTRIBUTED EXCEPT AS PROVIDED IN THE COURT'S ORDER."

In lieu of placing this label on the original of the documents, the party may place the label on the copies of the documents that are produced.

5. Confidential information which is disclosed at a deposition must be designated as confidential by indicating on the record at the deposition, or in writing to all counsel within ten days following receipt of the deposition transcript by counsel so designating, that the testimony is confidential and subject to the provisions of this Court Order with regard to confidentiality.

6. Confidential information may be inspected only by the following persons:

(a) Counsel of record for the plaintiff and defendants in this litigation, any lawyers specifically employed by them in connection with the litigation and any employee of such counsel assisting with this litigation;

(b) Experts retained by or on behalf of any party to provide assistance or testimony in connection with this litigation.

7. Each person, other than those described in §6(a), to whom designated confidential information or documents are to be disclosed shall, prior to such disclosure, agree in writing under oath or attestation to the following, a copy of which shall forthwith be furnished to all counsel:

> I hereby attest to my understanding that information or documents designated confidential will be provided to me pursuant to the terms and conditions and restrictions of the Protective Order of , 1985, in *Palmer v. Liggett Group, Inc., et al.*, the United States District Court for the District of Massachusetts; that I have been given a copy of and have read the Protective Order and have had its meaning and effect explained to me by the attorneys providing me with such information or documents, and that I hereby agree to be bound by it and its terms. I further agree that I shall not disclose to others, except in accordance with the Protective Order, such information or documents, and that such information or documents shall be used only for the purposes of the legal proceeding in which they were produced. I further agree and attest to my understanding that my obligation to honor the confidentiality of such information or documents will continue even after the termination of that legal proceeding. I further agree and attest to my understanding that, in the event that I fail to abide by the terms of the Protective Order, I may be subject to sanctions, including sanctions by way of contempt of court, imposed by the Court, for such a failure.

Copies of this attestation shall be served upon all counsel prior to such disclosure; in lieu of such service, copies of the attestation signed by medical experts may be filed under seal with the Court, for the period prior to the identification of such experts in pre-trial discovery.

8. No summary or copy of any designated confidential information or document shall be made by any person, other than at the express direction of the attorney to whom disclosure was first made. Any such summary or copy shall be subject to the terms of this Protective Order to the same extent as the information or document from which such summary or copy is made.

9. Inadvertent disclosure of any document or other information during discovery in this action shall be without prejudice to any claims that such material is confidential, privileged or otherwise protected from discovery within the meaning of Federal Rule of Civil Procedure 26(b)(3), and no party shall be held to have waived any rights by such inadvertent disclosure. Any document or information so produced and subject to a subsequent claim of privilege, work product or other protection, shall be returned immediately to the appropriate party and such document or information shall not be introduced into evidence in this or any other proceeding by any person without (i) the consent of said party or (ii) by order of the Court, nor will such document or information be subject to production (other than *in camera*) in any proceeding by virtue of the fact that it was inadvertently produced in this proceeding.

10. Prior to the disclosure of any confidential information to any person, other than outside counsel and their employees or medical experts, the party seeking disclosure shall advise counsel and the Court, in writing, of the name, address and occupation of the person to whom counsel proposes to disclose, for the purposes of this litigation, said confidential information. Within twenty (20) days after such advice, counsel to whom notice is given may give written permission for such disclosure or may give written notice to adverse counsel of an application to this Court for an Order prohibiting the proposed disclosure. No such

disclosure shall take place until the Court has acted upon such application. In the absence of notice of such application, the party seeking disclosure may proceed, after expiration of said twenty (20) days with the disclosure proposed.

11. The Clerk of the Court is directed to maintain under seal all documents and transcripts of deposition testimony filed in this litigation which have been designated, in whole or in part, as "confidential" pursuant to the terms of this Order.

12. In the event that any information or documents subject to the confidentiality restrictions of this Protective Order is used in pre-trial depositions, briefs, or other documents filed with the Court, or is referred to in any hearing before the Court, such use or reference shall be made under seal and bear the legend,

> "THIS DOCUMENT CONTAINS CONFIDENTIAL MATERIAL COVERED BY A PROTECTIVE ORDER OF THE COURT AND IS SUBMITTED UNDER SEAL PURSUANT TO THAT PROTECTIVE ORDER: THE CONTENTS OF THIS DOCUMENT MAY NOT BE DISCLOSED WITHOUT EXPRESS ORDER OF THE COURT."

and/or be reviewed by the Court *in camera* with the public excluded.

13. Within forty-five days after the final adjudication or settlement of all claims in this case, counsel for the parties either shall return all documents produced, if so requested by the producing party, or shall destroy all such documents. All copies of documents, and all information and notes derived from them, also shall be destroyed. Compliance with this provision shall be certified to by all counsel for the obtaining party or parties.

14. Nothing herein shall be deemed to restrict in any manner the use by any party of its own documents or materials.

15. Nothing herein shall affect the right of any party to seek additional protection against the disclosure of any documents or materials.

16. Any party may apply to this Court at any time, upon proper notice, for a modification of this Protective Order with respect to the handling or designation of any document or for any other purpose.

17. This Order shall be binding upon any future party to this litigation.

/s/ A. David Mazzone

A. David Mazzone
United States District Judge
February 25, 1985

Handwritten Order of the District Court accompanying Defendants' Request for a Protective Order, dated February 25, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANN M. PALMER, as Administratrix of the Estate of Joseph C. Palmer, and ANN M. PALMER and DAPHNE S. PALMER,

Plaintiffs,

—v.—

LIGGETT GROUP INC. and LIGGETT & MYERS TOBACCO CO., INC.,

Defendants.

Civil Action No. 83-2445-MA

DEFENDANTS' REQUEST FOR A PROTECTIVE ORDER

Defendants Liggett Group, Inc. and Liggett & Myers Tobacco Co., Inc. ("Liggett"), pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, request this Court enter the attached Protective Order. The Order provides, in part, that information produced or exchanged in the course of this action, including any appeal, shall be used solely for the purposes of this action.

In support of their request, Liggett states that because the plaintiffs' discovery demands, including requests for the production and inspection of documents, answers to interrogatories, and deposition testimony, require the disclosure of massive amounts of documents and information it would be physically impossible for defendants to designate individually each document containing confidential or secret information. In an effort to comply with plaintiffs' discovery needs while maintaining defendants' right to protection of its confidential information, defendants seek the protection of an order of this Court.

Dated: February 5, 1985

LIGGETT GROUP, INC. and
LIGGETT & MYERS TOBACCO CO., INC.

By its attorneys,

/s/ Francis H. Fox

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/s/ Donald J. Cohn

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REQUEST ALLOWED.

/s/ A. David Mazzone

U.S.D.J.
2/25/85

Transcript of Hearing before the District Court, January 28, 1988

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANN M. PALMER, as Administratrix of the Estate of Joseph C. Palmer, and ANN M. PALMER and DAPHNE S. PALMER,

Plaintiffs,

—v.—

LIGGETT GROUP INC. and LIGGETT & MYERS TOBACCO CO., INC.,

Defendants.

Civil Action No. 83-2445-MA

Hearing before MAZZONE, District Judge
Courtroom No. 5 U.S.D.C. Boston, MA
11:30 a.m., Thursday, January 28, 1988

APPEARANCES:

Nix & Potters
(By Robert S. Potters, Esquire)
184 High Street
Boston, MA, 02110,
Representing the Plaintiff.

Warner & Stackpole
(By Attorneys Joseph J. Leghorn and Samuel Adams)
28 State Street
Boston, MA, 02109
Representing the Defendant.

Public Citizen Litigation Group
(By Cornish F. Hitchcock, Esquire)
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
Representing the Movants

REPORTED BY:

James P. Gibbons
Temporary Official Court Reporter
2004, U.S.P.O. & Courthouse
Boston, MA, 02109, 426-8716
Mechanical Steno - Transcript by Computer

PROCEEDINGS

THE CLERK: Civil Action No. 83-445, Ann Palmer versus Liggett Group, et al.

THE COURT: Good morning, counsel.

All right, I thought it would be a good idea if we had a hearing on this matter, and you could answer some questions for me that might help.

I've read your memoranda and the reply memoranda as well.

Let me just identify — Mr. Potters, I know.

MR. HITCHCOCK: Your Honor, I'm Cornish F. Hitchcock.

THE COURT: You have not appeared previously, as I remember, Mr. Hitchcock?

MR. HITCHCOCK: That is correct, your Honor. We filed a motion. We filed our initial papers at the end of December seeking relief to appear and appear pro hac for Ms. Grace who could not be here this morning.

THE COURT: Of course Mr. Leghorn and Mr. Adams.

Now, Mr. Hitchcock, you want the discovery material filed in this case available to you?

MR. HITCHCOCK: That is correct, your Honor.

THE COURT: And you want it for public information purposes?

MR. HITCHCOCK: The relief — yes, your Honor.

The relief we're seeking and what we ask the Court to decide today is whether the information should be filed; and, secondly, whether the parties desiring secrecy should be required to

make a showing that certain materials that are confidential or entitled to be withheld from the public should be withheld.

As for those materials which do not qualify under Rule 26 for secrecy, we are asking the Court to lift the seal and allow those to be public. But for today's purpose we are asking for the filing and allow the parties to make the records for showing, as called for in the proposed order submitted to your Honor.

THE COURT: Now, one of the responses is that it's not timely. The case was closed. You did not seek certiorari. The case is over.

So my first question, and maybe Mr. Potters can answer.

MR. POTTERS: The case is over, your Honor. As the Court perhaps remembers, shortly after the decision of the First Circuit, a motion was filed by the defendants in this court to dismiss the action. That motion was allowed by your Honor.

THE COURT: As to all claims?

MR. POTTERS: As to all claims.

We neither sought certiorari on the First Circuit's opinion, nor did we appeal this Court's order dismissing the action.

THE COURT: You have not?

MR. POTTERS: We have not, and in fact we informed the defendants that we do not intend to.

THE COURT: So the case as far as you're concerned – there is no State Court claim?

MR. POTTERS: All claims have been adjudicated.

THE COURT: Did we close it, Miss Costello?

THE CLERK: Yes, we did.

THE COURT: It's a statistical closing.

THE CLERK: It's closed out.

THE COURT: What about that, Mr. Hitchcock?

MR. HITCHCOCK: My –

THE COURT: What jurisdiction do I now have? Should this be a matter if at all to be heard further, to be heard by the miscellaneous business docket judge; or why is this addressed to me since I have no further jurisdiction?

MR. HITCHCOCK: Our answer to that, your Honor, we go into this is in some detail in our reply memorandum, is two-fold.

First of all, the timeliness considerations that normally apply with parties coming into a case have to be assessed in light of what the parties are asking for.

The cases that the defendant cites deal with situations when a party tries to intervene in a case where there is a consent order, where the District Court is trying to fashion a remedy and the party coming in after the fact might raise questions that deal with the relief.

Here, and this is addressed in Judge Mansfield's comments and reported in our opening paper, the sort of relief we're asking is the sort of relief with which usual timeliness concerns do not apply. Judge Mansfield indicated in a motion, If records are not filed and a party later comes in and says they ought to be filed, that the party should be able to do so, and I think the local rule of this Court allows that as well.

Secondly, even though the order of judgment was entered in October, the time for filing certiorari did not end until – run out until the end of November; and even if the Court did enter the judgment, it was at best provisional.

The other factor is that as we read the papers, this Court indicated it was unwilling to examine these issues until after the Third Circuit had ruled in the Cipollone case, pending in the District of New Jersey.

The Third Circuit ruled in that case in the summer of 1987. The tobacco companies, the defendant in this case, took a petition for certiorari to the Supreme Court and that was not denied until December 7 of last year, at which point we began preparing the papers.

THE COURT: What right did you obtain as as a result of that ruling?

MR. HITCHCOCK: Excuse me, your Honor?

THE COURT: What papers have you obtained? What information have you obtained?

MR. HITCHCOCK: I'm not exactly aware, your Honor. The case is still progressing towards trial. I believe it's in trial now, and the parties have focused on this and haven't had a chance to talk to them about other matters there.

But there are several aspects I think are important in this case and several changes which Judge Sarokin made which the Third Circuit upheld.

The first deals with Paragraph 2 of this Court's order which involves this Court's order which has a seal on disclosure of any material, be it confidential or not confidential. Judge Sarokin said it is appropriately narrow to cover only confidential material, and anything that is not confidential may be made public.

The second aspect that's important here is that the return within 45 days element in the magistrate's order covered every single document. Judge Sarokin narrowed it only to confidential records.

The third —

THE COURT: What qualifies the confidential records under the protective order again? I haven't seen it.

MR. HITCHCOCK: What qualifies for confidential are those records which parties designate in good faith to be confidential within the meaning of the Federal rules.

THE COURT: But are they in the nature of business records, reports?

MR. POTTERS: Maybe I can explain, your Honor?

THE COURT: Yes.

MR. POTTERS: My recollection in this case is that there has never been a designation by the defendants in this case that any records in my possession are confidential which was required by the terms of the protective order.

As long as I'm on my feet, I also want to indicate to the Court that a dispute has arisen between the plaintiffs and the defendant as to the applicability of certain portions of the protective order. A request was made on me by Mr. Leghorn to return the Arthur D. Little documents, and that's the only discovery I have got in this case, as you may recall.

I responded to Mr. Leghorn that I didn't read Paragraph 13 which is the applicable provision in the protective order requiring return of documents within 45 days of conclusion of the litigation to apply to those documents; and I indicated to him and I felt that was the case, because by its very terms, Paragraph 13 returns the documents produced by the parties. And, of course, Arthur D. Little was never a party in this case.

I indicated, however, that there's no intention to disseminate those documents or giving them to anyone else unless there has been either instructions from this Court or adjudication of that issue. So the documents remain in my possession.

MR. HITCHCOCK: I have one comment on this.

There are several provisions in your Honor's protective order that do suggest that there has been a distinction between the

confidentiality — that the confidential material must be tagged or identified as such.

I'm referring specifically to Paragraph 4 that requires any party to indicate what documents or lines they believe are confidential, Paragraph 5, that requires any such information that's disclosed at a deposition to be identified as such; and Paragraph 12, it says any documents that were identified as confidential that are used in court proceedings shall be identified as such as well.

And I think that's important if your Honor looks at the Cipollone decision — from both decisions from the Third Circuit, it's an effort to balance the interest and having the protective order on one hand; and on the other hand, it requires parties to make specific claims and identifications so the party wishing to challenge any designation of confidentiality may do so.

And if I may, that's the third point. That was a change in the Cipollone case. There was no such provision allowing parties to challenge confidentiality designations.

The District Judge in that case did allow such a challenge and did provide for sanctions if there were designations of confidentiality that were made in bad faith.

Going back to another point, this gets back to the timeliness.

The nature of the issue is such that, we submit, it's properly decided by your Honor. Your Honor has presided over this case and has a better knowledge of this case than to be assigned for a judge in the miscellaneous docket or a motions docket, and we think it's appropriate for your Honor to consider it.

The prejudice they're complaining of would have been the same if we had filed on October 5 rather than in December, and there's a Catch-22 situation here. Parties come in and make these kinds of claims. They may be told, You're too early, but if you come in afterward, you're told, You're too late. There has to be a point of time in which parties can raise these issues.

One of the cases they cite, F.D.I.C. versus Ernst & Ernst, dealt with a case where a party came in two years after the judgment and the Court allowed the parties to be heard even though it denied relief on the merits. And we're at the preliminary stages here asking the Court to hear and entertain the motion on the merits and to grant the relief and to require anyone who can claim that those materials are confidential to do so.

The defendants spend a lot of their papers talking about the injury they will suffer.

All we are asking is that they make a particularized showing with respect to the particular documents which is, I think, what the rules contemplate, and what the Court in Cipollone focused on as well.

THE COURT: All right.

Anything further, Mr. Hitchcock?

MR. HITCHCOCK: I don't think so, your Honor. You can take the — however you wish to proceed.

THE COURT: Let me hear from either Mr. Leghorn or Mr. Adams.

MR. ADAMS: If your Honor please, did you have a question, or do you want me to address the issues as raised by counsel for the proposed intervenors?

THE COURT: Well, I'm trying, Mr. Adams, to get the motion in focus. You see, the difficulties I have coming to grips with that is the way I read the First Circuit opinion. Why don't you want this information disseminated?

I gather you don't want it disseminated because you say there are other cases pending in this court and the publicity or activity that would be generated as a result of this information would affect your right to a fair trial here. But why are you

even worried about that, because there won't be any trials of any other cases in light of the First Circuit opinion.

MR. ADAMS: Well, my first response to that, your Honor, is that Judge Skinner and Judge Wolf right out of this circuit have not said that.

There are two cases pending here against my clients. There are literally close to a hundred or over a hundred cases pending throughout the United States. There is one in trial in Mississippi. That's supposed to conclude today. There is one — opening arguments in the Cipollone case going tomorrow before Judge Sarokin.

So despite the decision of the First Circuit, despite the decision they wrote, which naturally we welcome, it has not put an end to litigation against tobacco companies. That's quite clear.

As to the documents themselves, I'm happy to argue that issue. I don't think it matters what the documents say or don't say for the issues in this case. But I'm happy to go into the nature of the documents, if the Court wishes me to do so.

I suggest if the purposes for which the plaintiffs — I don't question these are fine organizations, I just feel they're somewhat misguided as to where they're supposed to get their information.

Those documents are Arthur D. Little tests that they performed 25-30 years ago. If the public needs to know that with all the information that's out today among the public as to the nature of the tobacco and all the claims of adverse effects on health and so on which Mr. Hitchcock's clients are well aware of, I don't know why they need information that's 25 and 30 years old, if the purpose is not to give ammunition to other plaintiffs to go after tobacco companies.

If a plaintiff wishes to go after tobacco companies, he certainly can file a claim in court and proceed accordingly and probably obtain those documents. But we think it's up to the judge in that case; and not the judge in this case which is, as your

Honor said, what jurisdiction do you have, and it's our position that there is nothing here to intervene in.

This is a matter that is five years behind us, when the complaint was filed about five years ago, two and a half months after the entry of final judgment, three years after the protective order was entered and the lawsuit itself has been dismissed by your Honor on the merits.

And speaking of the protective order, I wish to correct my brother's reference to the Third Circuit's opinion of June, or he said of last summer of 1987, as being the one that your Honor was referring to. I suggest it was the decision that was then pending before the Third Circuit when your Honor denied for, I think, the third time a request to amend the protective order. The matter was decided by the Third Circuit on March 12, 1986, and essentially Judge Sarokin was reversed for putting aside — setting aside for all practical purposes the protective order entered by the magistrate.

The second issue that came up was the matter of marking the documents and that actually the Third Circuit did approve the protective order and actually referred to, if your Honor please, in the footnote, favorably to the protective order that your Honor had entered in this case.

I can give you a reference to that if you like.

But this protective order was specifically referred to favorably by the Third Circuit, in the Cipollone case. The issue that came up and was acted on by the Court in 1987 had to do with the marking of the documents "confidential," which documents were marked "confidential" and which documents weren't. It had nothing to do with the issues before your Honor that had been presented by a motion several times under the protective order.

One of the things that I think I learned at law school is that litigation had to end at some time. I don't know. If there is no limitation as to when parties can come in to look at discovery, there is no protection for litigants.

We deal with the parties. The parties are subject to rules. I do not see why intervenors, who certainly have a lesser position than the parties, should not be subject to the same rules; and I think my brother's argument that if you come in too soon, you're too soon, if you come in after the fact, you're too late, I think — I suggest to the Court that that is specious. If he has a right, the time to assert it is at the time that protective orders are issued and the Court can take that into consideration at that time.

The Court can take into consideration at that time what happens when the litigation ends and the parties can address it at that time.

But here we are after the fact, and if it is true as my brother argues, and I don't agree with it, if the reason why this protective order was issued was to guarantee or to assure a fair trial in this case, certainly that applies to all the other cases out there; and if the Court allows these people to intervene, these parties to intervene and receive that material, then it matters not what another judge does in another case before him or her to assure a fair trial. I think that matter ought to be left to the judge in each case, and on a case-by-case basis. I see no purpose that is served by allowing intervention in this case of these parties.

You can imagine, your Honor, the number of people, I mean — I say these parties that my brother represents are nationally known and I will assume for the purpose of this case, they have bona fide motives in seeking this material. You can imagine the number of people that would come in alleging that they have a good reason to examine these documents. I can imagine the Court having to make decisions with respect to each of those persons as to whether or not they were acting in good faith or whether or not they were entitled to the document.

I'll stop here. I have more to say but I thought you were asking questions and I went way beyond your question.

THE COURT: Well, I don't like to put you off your track. If you have an argument, and I want to be clear, Mr. Adams,

in what I meant. My somewhat unrefined thoughts, instincts, when I received the motion and all, were that I was without jurisdiction in the matter and the matter was closed. I wanted to confirm that to see that there were not some lingering issues that had not been addressed and that the matter was best addressed to the judges who have the other cases now pending. They may lift the protective order. So they'll release the discovery or file the discovery for exactly the same reasons, public interest reasons, I think that are advanced here. And that was my first instinct.

Then as I recall the protective order, when it was issued, I think at the request of the defendants –

MR. POTTERS: No, no, that's inaccurate, your Honor. There were two.

THE COURT: There were two.

MR. POTTERS: Yes.

We did seek one on Mrs. Palmer's psychiatric records and Joseph Palmer's medical records.

THE COURT: Yes, but ADL and all the other records were sought by the defendant, and so I came here and I said I wanted this hearing so I could ask counsel what it was about those records that would prejudice you.

You see we do this all the time. As you know we issue protective orders all the time. We protect sales secrets. We protect sales figures. We protect business operation, organization. We do that all the time for those good reasons, but I don't think that we ever – and we do it because we want to save parties the embarrassment or expense or whatever humiliation that may be in the records, as we did with Mrs. Palmer's motion for a protective order.

But it's hard to justify, Mr. Adams, closing the record in this case in light of the ruling by the First Circuit on closing the

record as far as this is concerned. When I read the ruling, I don't — of course I abide by it, of course, but I don't think it addressed the question, the real question, and why shouldn't this material be made available?

MR. ADAMS: Your Honor, first of all, as to the material itself, I have not seen all of the material. I came to this case, this is no excuse, but I came in this case — Mr. Leghorn and I came in when discovery was closed.

I think that any material, as old as it may be, disseminated to the public, can be used by the media of any kind, TV, newspaper. Quotes can be taken from here and there. Things can be cut and pasted and scissored together and a pattern of — somebody can argue that the testing was inadequate. Somebody can argue that it was as the result of this test we should have conducted another test. Anything can be contended, and I don't see what that has to do with the here and now in tobacco litigation cases. They are not over, despite the First Circuit. They are not over in the First Circuit. They're still out there. We continue on with them in the Baker case which is before Judge Wolf, and we continue on with the Kotler case before Judge Skinner.

Both judges have addressed or are in the process of addressing the effect on this case of the First Circuit's decision of Palmer, but it has not been precluded. I don't know how you preclude those matters. There's no indication to me that either the plaintiffs — there is no indication that the plaintiffs think their cases are over. There is no indication that either judge thinks the case is over.

He's asking the plaintiffs what they have to present, and each one has come forward with — there are these claims that are viable after Palmer.

So if this was a consideration in the Court's mind, a fair trial, when the Court entered this protective order, it's certainly still out there. It is still there, and there is no reason to go now and affect other cases, possibly affect other cases, by disseminating these documents.

I don't know precisely what the documents say, I've seen a few of them. But I can't see that they could not be used to affect and infect prospective jurors in those cases when they come to trial, and I feel confident that at least one of them will come to trial. I do not think the attorney for the plaintiff in the Baker case is going to give up if he feels he has any viable claim left, and right now he seems to be proceeding on addiction among other claims.

MR. HITCHCOCK: Did your Honor wish to speak?

THE COURT: Well, what do you have to say?

MR. HITCHCOCK: I wanted to say I did, as Mr. Adams indicated, I did check the docket. Both cases are pending before Judges Skinner and Wolf. Motions to dismiss or for summary judgment have been filed by the defendant.

I would say, in addition, that if there is concern about a fair trial issue, that there are other means available to the judges in those cases, questions to prospective jurors and the like.

One point I want to make, and this deals with your Honor's questions to Mr. Adams, Mr. Adams says that the tests were conducted a number of years ago and why do the parties want them? That's not the right question, we submit, under the rule. The right question is, Given the presumption of access to materials that are not confidential, what is the good cause for withholding materials from the public? And I would suggest that the court need not decide that today. What the Court could do is follow the procedure we suggested in our moving papers, which would be to have the parties submit the information or submit justifications from which documents as to which documents there is good cause for this much specificity.

That was the leading issue in Cipollone, in that the Court was concerned if the order was overly broad. That was the procedure that the followed in the Agent Orange litigation where Judge Weinstein said to the parties that the material would be made public except to the extent that parties desiring secrecy

could make a showing within x number of days after the end of litigation; and we think that's an appropriate procedure here rather than try to resolve the matter on the present record, particularly when there are dispositive motions pending in the other case and whether there are alternatives even if the material does come out and even if there might be the harm, which the defendants have not yet specified.

I would add, in addition, that there are motions covered that we indicated in the reply memorandum, the entire material, including the plaintiff's discovery, if there is some information involving interest or personal privacy, that's the sort of information that could be redacted as well, but the rules require good cause.

The party desiring the continuing of a seal has that burden, and we think the more efficient way to do it was to allow the parties to make that sort of showing so we can respond to it and your Honor can decide based on a fuller record than is disclosed in the moving papers here.

THE COURT: Thank you, Mr. Hitchcock.

MR. ADAMS: May I respond?

THE COURT: Yes.

MR. ADAMS: Apparently, I might add in the First Circuit decision of Judge Brown in the Palmer case, we have not filed. It was incorrect, counsel, at least the inference by counsel that we had filed motions for summary judgment in Kotler and in Baker. We have not. We recognize there are issues left. We have our views on how those issues are going to go, but we recognize there are issues left.

What we're talking about is, as I understand, some 18 boxes of Arthur D. Little documents. I repeat, I have not been through them. I don't know what purpose they'll serve anybody except to infect a prospective trial in this case, in tobacco litigation cases. I cannot imagine what earthly purpose they will serve American Heart, American Cancer or any other of Mr. Hitchcock's clients

except to say that tobacco companies should have done more. They didn't do more. They should have learned something, and they're bad guys.

If they're out to protect the public, they ought to be doing their own testing and presenting that to the public instead of spending time to come in here and ask for some 25 and 30-year-old documents.

I suggest that they have no basis to intervene, and the matter is over. There are no reasons to reassess your Honor's issuance of the protective order. There are no extraordinary circumstances. There is no compelling need, that is the standard at least in the Second Circuit which has certainly opened up protective orders after the fact, which has not been done in this circuit.

Certainly we have the basis for keeping protective orders in place. Your Honor has certainly read and studied, I am sure, the Cryovac-Anderson case in the First Circuit and Judge Skinner's protective order, where they questioned his selectivity in who the recipients might be.

I certainly don't – that which would seem to me that anybody could come in here and – anybody could come in here if these people have a right, if the American Charities [*sic*] have a right to come in, anybody has a right to come in and receive this information at any time.

Your Honor will be sitting here in hearings like this till retirement, if my brother it correct. If he has this right. I say he doesn't. The case is over. There are other cases going on.

When they're all over, the last judge before he enters judgment for the defendant can then say Mr. Hitchcock help yourself. Until that time comes, I think that your Honor should treat this as a case and a case which is finished.

MR. POTTERS: May I be briefly heard, your Honor?

THE COURT: Yes, Mr. Potters.

MR. POTTERS: Your Honor, I don't really think this Court has to go beyond the language that's contained in the present protective order. As I indicated before, and as I think the result of the litigation that occurred in the Third Circuit and subsequent to the Seattle Times case, that case being decided I think in 1984, in order for a protective order to cover any kind of documents, as I think the Court is well aware, there must be a showing of good cause.

Now, this protective order that was drafted by Liggett's counsel and was entered, and I don't recall if the Court made any changes to the language of the protective order, contemplated that confidential documents would be exchanged by the parties and that these confidential documents should not be disseminated and should be used only for this case.

I reiterate what I said before, which I think to a great extent may shortcut this whole proceeding.

At no time in the three years that this protective order has been in effect, has Liggett ever demonstrated or designated, I should say, has ever designated any of the Arthur D. Little documents to be confidential.

In opposing a motion to intervene by Dow Jones & Company, the Wall Street Journal, as your Honor may recall in the summer of 1985, Liggett's sole position or sole complaint, I should say, as to why these documents should not be disseminated is they unduly embarrass them.

Now, the Court indicated in denying the Wall Street Journal's motion to intervene, that there would be a public trial and at the conclusion of the public trial or during the public trial these documents would become public.

Quite obviously there's not going to be a public trial in this case, but had there been a public trial, these documents would be exhibits in the case.

While there are 18 boxes of those documents of Arthur D. Little, the only documents we kept or we maintained copies of consisted of approximately 1,200 or 1,500 documents; and these are not test results. These documents are memoranda from individuals at A.D. Little to representatives of Liggett at their headquarters in New York City as well as in North Carolina, I believe it is, indicating to them the results of Liggett research.

So I don't think that comments made by Mr. Adams that this 18 or 20 or 30-year-old research is of no value to the American public. I think as the Court is well aware of the present status of the dispute or the controversy between tobacco companies, and both plaintiffs' counsel and other organizations like those represented by Mr. Hitchcock, is that the tobacco companies continue to insist that there is no real medical data which causally connects cigarette smoking to any kind of physical disease or defect.

I would submit that these documents would indicate otherwise, and I would submit that there is a great public interest that these documents be disseminated. I would submit that in light of the fact that Liggett has to this day never really indicated what their interest is in keeping the documents from being disseminated, except that it would embarrass them, that there has never been a showing of good cause required by Rule 26 and that these documents should not have really been subject to the protective order. And now the litigation has terminated, and it is in the best interest of the public that these documents be made available for whatever use they may be made available either by other plaintiff's counsel or by the clients that Mr. Hitchcock represents.

MR. ADAMS: Your Honor, I simply call the Court's attention to Paragraph 2 of the protective order, which says "All information produced or exchanged in the course of this civil action or any appeal arising therefrom shall be used solely for the purpose of this case."

There are other references to documents being marked "confidential" and so on, but that's a separate paragraph. That stands on its own.

The issue is not whether or not the protective order is a good one or bad one, your Honor. I submit the issue is whether or not non-parties to this litigation can even raise the merits of the protective order at this time, and at this place in the posture of this case some two and a half months after final judgment.

The time to appeal ran out on November 6, and these arguments could have been made by the plaintiff certainly or by anyone else that wishes to intervene at that time prior to the determination of the litigation.

The litigation is over and I suggest that it should end with a denial of the action sought and the relief sought by these would-be intervenors.

THE COURT: Well, first as far as the rule is concerned, Rule 5 is concerned, the rule which excuses the filing of discovery material and our own local rules, those rules were mostly designed to avoid effort — that it was unnecessary in most cases. No one ever proclaimed those rules to have a constitutional significance. They are just similarly rules of housekeeping.

The rule, I think, contemplates that after the case is over, that whatever restrictions there were on the filing of the materials would be lifted because they're no longer necessary except by those people who would still be affected by disclosure, and that is the good cause rule. If the competitor would still be adversely affected because of trade secrets or sales figures or whatever were involved or were disclosed, then that would be a reason to continue the restriction. But otherwise just like exhibits in the case, after the case is over we routinely return the exhibits to the parties. We don't even keep them anymore.

So the system is a public system. It's a system which is designed to encourage accountability. The public should know what's going on and goes on in our courtrooms and it is a rational system.

I have some serious doubt about whether or not I can at this point modify the protective order or order the filing of discovery material, modify the protective order in order to allow its dissemination, at least those materials which have not been

designated as "confidential." And I go back to what I said at the outset of the case which is coming to grips with this motion in light of the current status of this case and the ruling of the First Circuit. Initially I had a marked-up copy which I put aside and cannot locate. So I picked up another copy this morning which may not be as fully marked up as the one I had, but just read with me for a moment the language of that First Circuit ruling, and of course the bottom line is that the claims are preempted. The claims of inadequate warnings about the dangers of cigarette smoking are preempted.

Now, the Circuit Court did the same thing I suggest I did, which is to review the history of the problem, and came to the exact opposite conclusion, but they've not been able — an obvious conclusion, but if you wanted to be faithful to our need for information and the tension that existed in arriving at this Act, here's what they say. "Faced with the conflicting state regulations, Congress stepped in in 1965 to set up a uniform, nationally consistent system of warning labels," and I'll paraphrase somewhat. It did so with the express intention of striking a balance between its concern for the national health policy of smoking education and its protection of the trade and commerce aspects of the tobacco industry. And it goes on to tell how important the tobacco industry is to national commerce.

It was a hard-fought compromise. Legislative history is full of the recognition of the policy and tension and it came down to the policy and purpose declaration in the act. It was the policy and purpose to establish a comprehensive federal program to deal with this whereby, one, the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and, two, Congress and the national economy may be protected to the extent consistent. So public education is a very important consideration.

It was outweighed in Judge Brown. It was outweighed in his opinion by the need to protect the tobacco industry. But, nevertheless, it was not a casual claim that was made and going on.

Congress expressly sought to inform the public that cigarette smoking may be hazardous to health by inclusion of a warning to that effect. Congress had two policies, health protection through education and trade protection, to strike a fair and effective balance between these two competing interests.

The result is the Act that represents a carefully drawn balance between the purpose of warning the public of the hazards of cigarette smoking and protecting the interest of national commerce.

I don't think I've been selective in reading from the rule. That's the thrust of the case, is that there is a tension between health education and protection of the tobacco industry and/or commerce I should say, and how is my ruling here or how is this motion — how does this motion fit? I mean going back to the original question I posed you, or state, that I was having trouble coming to grips with what I decided what the context of this motion was. I no longer have the case before me. The same motion that is being brought here today could be brought to other judges before whom cases are pending. They can rule on those motions, Mr. Hitchcock, I suggest, much the same way that I was asked to rule on several years ago, but in a different context you see. At the time I did not have the benefit of Third Circuit modifications, and I did not have the benefit of course of this ruling at the time.

If the protective order is lifted, will it serve the purpose of public education? The answer to that is clearly yes.

MR. ADAMS: I disagree, your Honor. Public education as to what? I think is the question. What the public is being educated on today has been determined by Congress. They have modified the label, the original label, on two modifications. Congress has all its resources and in all its investigatory powers has come up with what it considers an adequate warning to the public. You may disagree and Judge Sarokin may disagree. Others may disagree, but Congress has made that decision.

Congress is educating the public with these warnings. As you know there are three at the present time. I think Congress has

made the decision as far as educating the public, and I don't think it's the function of this Court, I disagree with your Honor, as to the function of the judiciary. We have open public trials for the obvious reason that such matters should not be carried on behind closed doors, but I think the purpose of discovery is to serve the litigants and not to serve as a means of educating the public.

I think you and I have a basic disagreement on that issue and I do not think it is your function to serve, through the process of releasing discovery documents, some goal of educating the public.

There may be lots of things the people are interested in, private diaries in divorce litigation of celebrities. There may be lots of things that may be there that someone would be interested in, but it is not the function of this Court, I suggest, to give that information to the public, particularly after a protective order has been entered and the case is over.

I feel that it is not a proper function of this Court to do that. I do not think that these documents, getting specific again to the documents in litigation, which are aged documents sought by my brother, that they're not anything current that is going to tell the public anything. They're going to be used by someone, I suggest, to say the tobacco companies should have done more, should have known more, did know more, and that will serve those who oppose the tobacco companies, those who are encouraging litigation against tobacco companies. That will serve their purpose, but educating the general public, no, and I don't think, I say again, I don't think it's this Court's function to do so at least under these circumstances.

MR. HITCHCOCK: Your Honor, if I may respond.

First of all I call the Court's attention to the advisory committee comments when the rule was amended in 1980. There was a concern at the time that the initial proposal was that no discovery would be required and the drafters of the rule and the advisory committee acknowledged that there wasn't any interest

in having material made available to the public, even if it is not used in the litigation, and that's why the rule was drafted as it is for a presumption that non-confidential material would be made publicly available in the clerk's office even if it doesn't rise to constitutional levels of concern. We're not arguing that here unless there is a local rule or there's good cause; but even if there is a local rule as Rule 16(g) of this Court says that if any of the parties are concerned citizens believing that any of the documents should be filed, such a motion should be made. And I think I suggest that the people that we represent here are at least concerned with this issue, and that anyone else might be and are doing the research and other things that Mr. Adams referred to. So the notion that it's just a housekeeping rule is not correct and that argument was made and emphatically rejected in the Agent Orange litigation by the Second Circuit.

Now, with respect to your Honor's question about public education and balancing health education with protection of commerce, I submit, and I suppose this is no surprise, that we believe that granting our motion does balance the two; because on the one hand you make available to the public and to Congress and to let the public and Congress decide what it needs to know with non-confidential information that we had made available. On the other hand, the motion allows the defendant to identify those documents which they believe would cause commercial harm, trade secrets, that sort of thing. That's the balance that was struck in Agent Orange. That's the balance that was struck in Cipollone, and that is the balance we submit should be struck here.

The warning labels that Mr. Adams points out have not been cast in concrete. Congress did revise them in 1984. It has examined or re-examined the concept of smokeless tobacco in the 1986 legislation. The more information that's available will allow Congress and the public to be better informed and to make better judgments about what kind of protection the public needs.

The defendants argue in this Court in seeking to dismiss, that Congress has primacy. Congress ought to have the information that's not commercially sensitive or confidential under the

meaning of Rule 26, and we submit that's why the motion should be granted.

At the risk of getting back into the timeliness question, I would hope we are not penalized. We read your Honor's order when this issue come came up in 1985, but your Honor didn't want to get in this again until the Third Circuit had ruled. For better or worse it took two trips to the Third Circuit before the Third Circuit did rule with the mandamus petition on two occasions, and that didn't wind down until last year and the matter was still alive until December just last month.

We tried to repect your Honor's concern at the time by not coming in here and the possibility that the Supreme Court might step in the case. We didn't come in when there was the possibility that Mr. Potters might file the certiorari petition which might move out any entry of judgment in this case.

It's — what the defendants haven't articulated is why they would not have been injured if we filed on October 5 but they're prejudiced because we come in two months later. I refer the Court to the cases we cited in note 5 of our reply memorandum. Those deal with cases where parties come in and say, We want to be able to obtain information in closed cases, and the Courts have considered them. The first case Brown and Williamson versus the FTC was a case where an amicus curiae raised an issue about a protective order in the Court of Appeals which considered it without having the District Court rule on it.

Again, the FDIC case which defendants cite, involved parties which come in two years after a case had been settled and said we want to get access to certain sealed information, and the Court said, Even though you're coming in two years late, your motion is not untimely given the nature of the information.

The point of timeliness concerns is what is the prejudice, and the prejudice is not for a party to say we may lose, but focuses on why are you being injured now as opposed to if you came in two months ago, and here we submit there is no difference.

I submit the Court does have jurisdiction to consider the matter. The matter before the other parties — to tighten up the loose ends, in the Kotler case the docket sheet indicates that Liggett moved for judgment on the pleadings on November 16 of 1987 and claims there deal with breach of warranty, negligence, misrepresentation of the sort that were involved in here, and the one party moves to dismiss. The other party moves for summary judgment.

In the Baker case, Judge Wolf's order stayed discovery pending the outcome of the Court of Appeals decision. In Kotler — and there is a hearing scheduled for April on the effect of Palmer on that case.

The hearings are in chambers, but I would suspect the defendants are arguing that that case should be dismissed on the basis of Palmer. If they are conceding there is anything left in the case, I would be interested to know what it is.

In response to your Honor's concern that we should make this motion before Judge Wolf or Judge Skinner, the documents are here in this court. We don't believe the Court is barred on jurisdictional grounds. Your Honor is capable of deciding it. Judge Weinstein decided afterwards in Agent Orange. Other Courts have considered these motions after the fact. If there is good cause, we're willing to let the defendant come in and show us what it is or the plaintiff if it's personal privacy concerns. That's the only relief we're seeking today.

MR. ADAMS: Brief response, your Honor.

The Agent Orange case, Judge Weinstein's case, that my brother referred to, first of all, the movants came in before final judgment in that case. The movants were class members, intervenors who had a direct interest in the lawsuit, clearly distinguishable.

My brother refers to another case which he and Mr. Morrison were involved in, another Second Circuit case, F.D.I.C. versus Ernst & Ernst in which the confidentiality order of the District Court was affirmed on appeal, and I'm not going to go into the

case, but I commend it to your Honor to review in connection with your decision in this case. I believe it's cited in the brief.

I did want to say that we did comply by filing all the discovery that was noticed during the period prior to local Rule 16 coming into effect. In fact our answers to interrogatories have been filed and are on file in the District Court.

THE COURT: Well –

MR. ADAMS: And discovery, all discovery was conducted before local Rule 16?

MR. HITCHCOCK: Your Honor, just very briefly.

We submit that the Agent Orange case which we also handled does support us with reasons set forth in the brief, and I don't think it matters much, but the movant party there was a non-party. It was a veterans' organization that was not allowed intervenor's status but that was allowed to proceed nonetheless and litigated the case in District Court as well as the Court of Appeals without regard to formal status, and which is mentioned in the memorandum. I think the arguments are at least as persuasive as they are here.

THE COURT: I read the Agent Orange matter, and am impressed by it and the reasoning of Judge Weinstein.

First, I believe I do have the authority to rule on this matter. The case is mine. I'm familiar with the case. The case itself is over as far as the merits are concerned, but there are these issues, this issue which is alive and I think I am best able to resolve the matter.

The second point perhaps I sounded somewhat ambivalent when I came and called the hearing to order this morning, and the ambivalence was based on a desire not to be perceived as roaming around freely imposing my own ideas on what's right or wrong or impact on this case. I wanted to look to all of the circumstances of this case and I spent a lot of time on your

submissions and on the cases that you cited, and how I come down to differentiate this case from the other cases in which protective orders are issued and discovery is restricted. This is not a patent infringement case. It's not a security or antitrust case. It's not a product liability in which a product and its implication of a sale of the product or whatever are involved.

This is a case involving a health issue so important that it resulted in a congressional Act which preempted all claims. Congress has taken this Act, taking these issues out of the courts, as far as I'm concerned, but that does not mean because it has preempted the act, the need for the public to be educated and to know what's going on is lessened. If anything, given the protection of the preemption, there should be no restrictions on this information. The effect on other cases can be controlled by other methods and techniques that judges regularly employ to insulate jurors or to select jurors who are free from influence.

If disseminating this information encourages other lawsuits, that's happened in every large-scale mass tort litigation. It's happened in asbestos. It happens in a lot of cases. You encourage lawsuits because other people are alerted to the fact that something was wrong, and if it is, if it does encourage lawsuits, then the system will, in an open and public and rational way, screen out those issues and dispose of them. Even if these documents are old, Congress has had this matter in front of it for 30 years, more and since 1965, at least, when this act was passed.

So I don't think that there is any good reason why this information — or compelling reason, I should say there. There are lots of good reasons that I'm sure the Circuit Court will find, but no compelling reason why the public ought not to know what was known in the industry and what Congress was so concerned about that it had to strike this very very difficult balance in favor of trade over public education. If it were easy for them it would be easy for me. They had a great deal of trouble, and so subsequently I'm going to grant the motion to order the filing of that materal not designated as "confidential" and modify the protective order accordingly.

MR. ADAMS: Would your Honor grant a stay, pending appeal?

THE COURT: Yes. Ten days, Mr. Adams.

MR. ADAMS: If we appeal within ten days. If we do it then, we are then protected?

THE COURT: Yes.

MR. ADAMS: So your stay will continue until resolution by the First Circuit if we appeal within ten days?

THE COURT: Yes.

You will file your discovery material, except that designated as "confidential," after ten days unless you appeal; and then if you appeal, then this order is suspended pending a final determination. You said it better. You don't have to file this material and you're protected until you get a final ruling from the Circuit Court pending appeal.

If you don't appeal within ten days, I expect the material to be filed on the 11th day or soon thereafter, when you get around to it officially.

MR. ADAMS: We will file, and I know attorneys have said that, but we certainly will file. Mr. Potters I believe has some 1,200 documents of the 18 boxes that I remembered.

THE COURT: Just tell me a time.

MR. LEGHORN: The question, your Honor, is if we file an appeal within ten days and don't have to file any documents with the Court, does the protective order preventing Mr. Potters from disseminating those documents continue on?

THE COURT: Yes. The protective order continues on if you appeal this case within ten days. I don't want any half dissemination. The protective order remains and exists as though this

motion was never brought, if you appeal within ten days.

MR. LEGHORN: Well, your Honor, for clarification does this order apply to all of the protective orders in this case including those pertaining to plaintiffs?

THE COURT: Yes. That includes Mrs. Palmer's protective order.

MR. POTTERS: Do I understand that –

THE COURT: Why not?

MR. POTTERS: For two reasons.

THE COURT: Let me strike that, because there has been no motion. I have dealt with the motion I have been faced with. The motion I dealt with, I granted. If you want to make such a motion, make it.

MR. LEGHORN: The language of this order, or the various protective orders, are the same and the motion sought public access to discovery material, and focusing on Liggett, did not differentiate.

THE COURT: I understand, but I'm thinking of public purpose. I am thinking on the basis of my rulings.

It certainly makes no sense to require Mrs. Palmer to disclose the history of her husband and all of those matters. That would be public humiliation and embarrassment. I don't see the same factors going the other way.

MR. POTTERS: So it only applies essentially to the Liggett documents?

THE COURT: It applies to the information that is at issue here which is –

MR. POTTERS: The Arthur D. Little documents.

THE COURT: Yes.

MR. POTTERS: Could I have a question for clarification purp es.

I understand that at this point Liggett does not have the opportunity now to designate these documents as confidential. That issue has been resolved by their not having done it up to this point.

THE COURT: If they've not done it, I would assume that's the case.

Thank you, counsel.

MR. ADAMS: Your Honor, please, the question goes beyond the Little documents, I believe, your Honor, because there are also depositions taken of Liggett personnel with documents produced and testimony was elicited and was subject to the protective order. I presume that by leaving the protective order in place if we appeal within ten days, all the prohibitions contained in the protective orders continue to pertain to the case.

THE COURT: Yes. Everything stays where it is if you appeal within ten days.

MR. ADAMS: I'm not trying to embarrass Mr. Potters or your Honor, but I think my brother's request points out some of the problems, and I know you don't want to hear them again, but any plaintiff can come in to get documents if they can come within Rule 11, and it doesn't matter what their claim is. That serves a public purpose? It's a serious question.

I think the validity of her claim certainly relates to our case. It should relate to our case and I think I have no reason to disseminate those, but I think once these documents get public, I think we have a right to respond and make sure of the claim that this gentleman made, if we wish to do so. I think we have a right to defend ourselves.

MR. POTTERS: That's not defending oneself. That's trying to embarrass the plaintiff.

THE COURT: I stay by the ruling I made.

MR. LEGHORN: Your Honor, I seem to be bogged down in details. Mr. Hitchcock's motion talked about, if we don't appeal, talked about a procedure where we would have 60 days to produce an index and within that index point out documents which we believe to be confidential in nature.

Under the old protective order by its nature, we didn't have to engage in that process. At the time it sped up discovery and I think Mr. Potters has raised an issue which is different than the motion proposed by Mr. Hitchcock and his clients.

MR. HITCHCOCK: If I may respond, I cited earlier several paragraphs. Paragraphs 4 and 5 did require parties to designate materials as "confidential." If what we're thinking is if there might be anything that fell through the cracks. I mean the burden under the protective order was on the parties to make the designation line by line or document by document at the time.

I'm not sure if there is anything else out there that might not be covered by it, but I mean we did try to have some protection, but nonetheless we didn't want to turn it into a whole scale opportunity to make claims that were not previously made after parties had an opportunity to designate in good faith any of these "confidential."

THE COURT: Well, as far as the issue posed by Mr. Potters, I see no purpose of having the protective order lifted, and no motion is before me to having the protective order lifted as it pertains to Mrs. Palmer's submission. So this issue is closed.

As far as this issue is concerned, I recall the motion and made some suggestions, but it's not my intention to review these documents one by one and decide what is confidential and what is not confidential. Whatever has been designated "confidential," I assume is; and I assume that that takes the place of — takes in all of the economic fallout that can happen when those documents are released. Those are the documents that deserve protection. The laboratory reports or analysis or whatever else that Arthur D. Little did, and I have no idea what's in those

documents, that's not protected. That's what the public ought to know as far as I'm concerned. That's what my order contemplates.

MR. ADAMS: Then your Honor will make the ultimate determination with respect to those documents.

THE COURT: No.

What determination?

Effectively you've got to turn over everything that Arthur D. Little did to him, if those are the documents at stake here, the so-called 18 boxes.

MR. ADAMS: Even though we may consider them confidential at this time.

THE COURT: Well, if they're confidential because they show that it cost Liggett & Myers so much to make a product because they used this device or this technique and that secret they don't want revealed to some other competitor, that I can see being confidential, which does not affect the public's right to know what is in the cigarette or in the use of tobacco.

But on the other hand and I'm just sort of speculating that if the report dated 1940 says that this is a device which contains grave danger to the American public and contains poisonous substances and ought not to be disseminated, that I do not consider to be confidential. That's all I want to do is rule that the information that might be helpful to people deciding whether or not smoking is — educating people of the hazards of smoking, get that information.

MR. POTTERS: Now you got me a bit confused. I am in possession of this document —

THE COURT: If it ever sees the light of day, I'll be content.

You don't have to be confused at all.

MR. POTTERS: I am, but only for this purpose.

Do I understand that Liggett can now designate from –

THE COURT: If they haven't designated it –

MR. POTTERS: So that issue is foreclosed?

THE COURT: I think so.

As I said, I'm not concerned about trade secrets and production. I want information about smoking hazards. That is not confidential.

MR. POTTERS: Thank you, your Honor.

(Whereupon the hearing was adjourned.)

Court, U.S.
FILED
DEC 29 1988
JOSEPH E. SPANIOL, JR.
CLERK

(3)

No. 88-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LIGGETT GROUP INC. and
LIGGETT & MYERS TOBACCO CO., INC.,
Petitioners,

v.

PUBLIC CITIZEN, AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION and AMERICAN PUBLIC HEALTH ASSOCIATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the court of appeals correct in upholding the modification of a blanket pre-trial protective order when the reasons for entering the order no longer applied, inasmuch as the case was concluded, there is no longer "good cause" for secrecy, and the party opposing disclosure never designated any documents as "confidential," as it was required to do under the protective order?

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IN THE

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OCTOBER TERM, 1988

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LIGGETT GROUP INC. *et al.*,

Petitioners,

v.

PUBLIC CITIZEN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Public Citizen, American Cancer Society, American Heart Association, American Lung Association and American Public Health Association respectfully urge the Court to deny the petition for a writ of certiorari for the reasons stated below.

STATEMENT OF THE CASE

The issue raised by the petition is whether the courts below acted properly in modifying a pre-trial protective order so as to permit disclosure of certain records which petitioners produced in discovery, but which they never claimed were confidential. Petitioners describe that ruling in apocalyptic terms,

ıt they give only a bare-bones account of the reasons why e protective order was entered in the first place and then odified. Because the facts are crucial to an understanding the issue presented, we set them forth in enough detail to ıable the Court to appreciate what is and what is not at stake this case.

A. *Proceedings in the District Court*

This product liability suit was filed against petitioners (col-ctively "Liggett") in 1983 by the wife and daughter of Joseph Palmer, who died of lung cancer in 1980 after having smoked garettes manufactured by Liggett for a number of years. In ıuary 1985, during the initial discovery phase of the case, intiffs noticed the deposition of and issued a deposition sub-ena to Arthur D. Little, Inc. ("Little"), a consultant which rformed research work for Liggett in the 1950s. By agree-ent of the parties, plaintiffs' counsel was allowed to inspect boxes of documents at Little's offices on 30-31 January 85, and he then copied and took with him the equivalent one box of documents for use in the case (Pet. App. A2-A3).

Several days after plaintiffs' attorney was given the box of cuments with no conditions attached, Liggett filed a mo-n for a protective order covering all past and future discovery sponses. The only ground it advanced for blanket secrecy s that plaintiffs' discovery demands were "massive" and t it would be burdensome for Liggett to designate which ecific documents contained confidential information (Pet. p. N1). Despite this statement, the protective order which ggett submitted with its motion required Liggett to designate records that it regarded as "confidential" (Pet. App. M2). er plaintiffs' objections, the district court signed Liggett's posed order on 25 February 1985, and it is that order which derlies this petition (Pet. App. M1-M6).

Several months later, *The Wall Street Journal* filed a motion to gain access to the Little documents, and plaintiffs filed a notice of their intention to provide these materials to the *Journal*, arguing that the records were produced before the order took effect and had not been designated "confidential." Plaintiffs also submitted an affidavit stating that Liggett's counsel told plaintiffs' counsel at the time the Little documents were produced that none of them was confidential. Liggett did not dispute this statement, but responded by filing a motion to compel plaintiffs to keep the Little documents under seal (Pet. App. A3-A4, L1-L4).

The district court ruled in favor of Liggett and against plaintiffs and the *Journal*, explaining: "The dissemination of this material will not aid in the fair trial of this case. The trial is public and the Wall Street Journal is, of course, able to attend the trial (Pet. App L4)." Several days later, the *Journal* sought reconsideration of this ruling, citing an intervening decision in another smoking case where Liggett was a defendant, *Cipollone v. Liggett Group Inc.*, 106 F.R.D. 573 (D.N.J. 1986). In *Cipollone* the district court narrowed a magistrate's protective order which was virtually identical to the one entered by the district court here. The principal effect of that modification was to protect only documents which a party had designated as "confidential" and to permit counsel to disclose records that were not so designated. The *Journal*'s request was denied, although the district court said that the unsealing motion should be renewed after the Third Circuit had ruled on the appeal filed by Liggett and the other defendants in *Cipollone* (Pet. App. I5).

In April 1986 Liggett moved to dismiss plaintiffs' state law claims which were based on a "failure to warn" theory, arguing that those claims were pre-empted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-41, which

requires that warning labels appear on cigarette packages beginning 1 January 1966. The district court denied the motion, but the First Circuit reversed, holding on 25 August 1987 that the claims were pre-empted. *Palmer v. Liggett Group Inc.*, 825 F.2d 620. Liggett then moved to dismiss the entire case, and the district court granted this motion on 7 October 1987. Plaintiffs did not appeal from that judgment, nor did they ask this Court to review the First Circuit's pre-emption ruling, and the time for filing a certiorari petition expired on 23 November 1987 (Pet. App. A5-A6).

Under the terms of the protective order, all counsel were obliged to return or destroy discovery materials within 45 days after the case ended (Pet. App. M5). On 28 December 1987, before that period had elapsed, respondents filed the motion which gave rise to this petition. Respondents' motion asked the district court to direct that all discovery materials be filed with the clerk and that the blanket seal be modified to permit public access to all documents which did not qualify for withholding on the ground that they were "confidential" under the terms of the protective order (Pet. App. A6, E1-E2). Respondents also sought (and the district court granted) an emergency motion requiring the parties to retain the records intact pending resolution of the unsealing motion (Pet. App. F1-F3).

In support of the motion, respondents argued that there is a presumption of access to these records under the Federal Rules of Civil Procedure, inasmuch as Rule 5(d) requires parties to file discovery materials with the clerk, where they are available for public inspection unless the district court finds that there is "good cause" under Rule 26(c) for sealing them. When, as here, the district court has excused parties from filing discovery materials (as it is empowered to do under Rule 5(d)), respondents argued that the court may (and in this case

should) order the documents filed. Their argument relied heavily on a Second Circuit case which ordered the filing and unsealing of discovery materials in the *Agent Orange* litigation. *In re "Agent Orange" Product Liability Litigation*, 104 F.R.D. 559 (E.D.N.Y. 1985), *aff'd*, 821 F.2d 139 (2d Cir.), *cert. denied sub nom. Dow Chemical Co. v. Ryan*, 108 S. Ct. 344 (1987)("*Agent Orange*").

Respondents also urged the court to re-examine the protective order and to hold that there was no longer "good cause" for maintaining the seal on non-confidential records. They pointed out that the First Circuit's pre-emption decision (as well as similar rulings in other circuits) had the sweeping effect of immunizing cigarette manufacturers from liability under state tort laws, thus making Congress the sole arbiter of how much information must be provided to consumers on this important public health issue. They noted (as the First Circuit acknowledged in its pre-emption decision, Pet. App. B6 n.6), that Congress had amended the Labeling Act and had changed the content of these warning labels as it received new information on smoking and health. They also asserted that there was an overriding interest in public access to these non-confidential materials so that Congress and the public could have as much information as possible about the health hazards associated with smoking.

Liggett opposed disclosure on a variety of grounds, including the argument made in its petition that non-confidential records which are produced in discovery, but not used in the litigation, should remain forever under seal. Apart from these general claims, the only "good cause" which Liggett cited for continued secrecy was the fact that, notwithstanding the First Circuit's pre-emption ruling, two smoking cases were still pending against Liggett in that district, in addition to other suits pending elsewhere.

The district court heard oral argument on 28 January 1988, at which time plaintiffs' counsel stated that the only discovery which he had obtained from Liggett was the one box of Little documents, which he still had in his possession. He described these records, which Liggett never claimed were "confidential," as memoranda from individuals at Little to representatives of Liggett indicating to them the results of certain research. He added that the records cast light on Liggett's claims that there are no medical data showing a causal connection between cigarette smoking and any kind of physical disease or defect (Pet. App. O6, O17-O18). It is this box of Little documents that is the focus of this petition.[1]

The district judge granted respondents' motion and ordered that the documents be filed with the clerk and unsealed. In weighing the competing arguments for and against disclosure, he noted the public education goals which Congress had in mind when it enacted the Labeling Act and stated that this case involved "a health issue so important that it resulted in a Congressional act which preempted all claims." He further stated that, even if state law claims are pre-empted, that does not mean that "the need for the public to be educated and to know what's going on is lessened. If anything, given the protection of the preemption, there should be no restrictions on this information" (Pet. App. O27). The Court added that Liggett's concern about the effect of disclosures on jury impartiality could be "controlled by other methods and techniques that judges regularly employ to insulate jurors or to select jurors who are free from influence." On balance, he found no "compelling

[1]Apart from the blanket protective order, the district court also issued two separate orders covering certain medical records produced by plaintiffs. In considering respondents' unsealing motion, the district court declined to modify these orders, finding that the personal privacy interests were still paramount (Pet. App. O29-O31). That ruling was never challenged on appeal.

reason'' why the information should remain under seal and granted respondents' motion, which he stayed pending Liggett's appeal (Pet. App. O27-O28).

B. *Proceedings in the Court of Appeals*

On 28 September 1988 the First Circuit unanimously affirmed the order lifting the protective order, although it modified the decree so as to excuse counsel from having to file discovery materials with the clerk. The effect of this decision was to return the matter to where it was before the protective order was entered: Plaintiffs' counsel is allowed (though not compelled) to make the non-confidential documents in his possession available to respondents (or other third parties), and he has stated his willingness to do so (Pet. App. O18).[2]

Although the First Circuit did not believe that it was appropriate to impose a filing requirement on parties after the case was over, it viewed the protective order in a different light. The court noted that the protective order remained in force even after the case was over and had the effect of permanently enjoining plaintiffs' counsel from disseminating the records, which counsel could have done had the order never been entered or if it had only prohibited disclosure of ''confidential'' records. The court reasoned that since the district court may enforce violations of its protective order even after a case is over, that court also has the power ''to modify

[2]Respondents disagree with the portion of the court of appeals' decision which excuses parties from filing discovery materials with the district court. However, in light of plaintiffs' willingness to make the documents available to respondents, this adverse ruling has no practical effect on respondents. If review should be granted, respondents will defend the result achieved below by supporting the lower courts' ruling on modification of the seal, as well as the filing requirement on which the court of appeals disagreed with respondents.

discovery-related protective orders, even after judgment, when circumstances justify," citing a variety of cases where courts have considered — and in proper instances granted — similar post-judgment requests to modify protective orders (Pet. App. A13).

After rejecting procedural objections regarding respondents' intervention (which Liggett does not ask this Court to review), the court turned to the merits of the unsealing motion in light of this Court's opinion in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). The court noted that this case differed from *Seattle Times* in that respondents did not rely on common law or First Amendment theories to override a trial court's finding that "good cause" exists for entering a protective order. Instead, respondents relied solely on the Federal Rules of Civil Procedure in urging the district court to reconsider its earlier ruling and to hold that there is no longer "good cause" under Rule 26(c) for keeping non-confidential documents under seal (Pet. App. A24-A25).

The court of appeals then addressed Liggett's claims that lifting the protective order would impermissibly intrude on Liggett's privacy interests and would excessively disrupt and delay the litigation process. The court found that the Federal Rules "themselves seek to accommodate concerns of privacy and litigative efficiency" (Pet. App. A26), adding that "'private litigants have protectible privacy interests in confidential information produced through discovery,' but . . . the means for protecting that privacy interest is Rule 26(c)." *Id.* at A25-A26, quoting *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 355 (11th Cir. 1987), and citing *Agent Orange*, *supra*, 821 F.2d at 145. The court added that if Liggett's interest in shielding non-confidential records were as great as Liggett claimed, the result would be to require district courts to enter protective orders even when the "good cause" standard of Rule 26 is not satisfied.

The court concluded that the protective order had been properly modified in this case. Citing *Seattle Times*, cases from other circuits, and the *Manual for Complex Litigation, Second*, the court noted that control of discovery "is a matter falling peculiarly within the discretion of the trial court" and that while blanket protective orders "may be useful in expediting the flow of pretrial discovery materials, they are by nature overinclusive and are, therefore, peculiarly subject to later modification" (Pet. App. A28). In this case, the district court stated on several occasions that the protective order was intended to promote a fair trial, during which the sealed information would be made public. Because dismissal of the case on pre-emption grounds eliminated the possibility of a trial, and with it the rationale upon which the protective order rested, the court found it was proper to consider modification of the protective order (Pet. App. A28-A29).

The court of appeals recognized that the mere fact of dismissal does not automatically warrant lifting a seal; there may be cases in which a party has relied upon the entry of a protective order to turn over documents that are either irrelevant or confidential, thus making subsequent modification unfair to that party (Pet. App. A29). The court held that this case did not fall into that category since the documents here were concededly relevant to the merits and since Liggett's counsel never claimed that the records were confidential, as the protective order required. Therefore, the court concluded, "the reasons underlying the initial promulgation of the order in respect to the particular documents no longer exist; and the district court made a reasoned determination that public interest considerations favored allowing counsel to make those particular records public" (Pet. App. A30).

REASONS FOR DENYING THE WRIT

As the foregoing statement makes clear, the courts below simply held that whatever "good cause" existed for a blanket seal during the pretrial phase of the case, those reasons no longer apply. These courts also found that there are countervailing reasons to encourage disclosure of these records which Liggett never claimed were "confidential," as Liggett was required to do under the order which it drafted and persuaded the district court to sign.

Despite the unremarkable and rather fact-bound nature of this ruling, Liggett contends that the decision below has produced the extraordinary result of giving the public access to non-confidential discovery records which were not actually used in the course of deciding a case. This decision is said to warrant review because it allegedly tramples on privacy rights recognized in *Seattle Times*, conflicts with the Federal Rules of Civil Procedure and decisions of other circuits, and has such "far-reaching and dire consequences for the fair and equitable application of discovery rules throughout the country" that an exercise of this Court's supervisory authority is warranted (Pet. at 4). As we now demonstrate, these assertions are either incorrect, overstated, or based on false assumptions; hence, there is no reason for this Court to grant review.

1. Liggett's initial assertion is that the decision below conflicts with *Seattle Times* (Pet. at 10-11). The problem with this claim is that it relies on a selective reading of that case and upon the mistaken premise that *Seattle Times* created a broad right of privacy which bars "[a]ny use of discovery material outside the sole purpose for which it was produced," namely, "prosecuting and defending a federal lawsuit" (Pet. at 11).

In *Seattle Times* a litigant challenged a protective order that was entered upon a showing of good cause under a state court rule which was identical to Rule 26(c). This order was alleged to be an unconstitutional prior restraint, but this Court upheld the order, citing the privacy interests of litigants and the need to move cases to trial. It is this portion of *Seattle Times* that Liggett's petition copiously quotes, without once mentioning the latter portion of that decision, which makes it clear that these concerns do not compel entry of a blanket, permanent protective order and that overly broad protective orders may have to be reconsidered as the case progresses. This contrast is demonstrated by the fact that this Court limited its holding to situations where the protective order is "entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial discovery, and does not restrict the dissemination of the information if gained from other sources . . ." 467 U.S. at 20.

Seattle Times thus reenforces the "good cause" standard in Rule 26 as the touchstone for any inquiry into the proper scope of a protective order. Since respondents' only argument is that good cause is lacking in this case, and since all the lower courts did was to agree with that argument, it is apparent that the decision below is fully consistent with *Seattle Times*. Nothing in that opinion suggests that a district court lacks the power to modify a protective order if the good cause which prompted its entry evaporates, especially if there are countervailing reasons which favor lifting the seal.

If anything, *Seattle Times* supports respondents since the Court emphasized that the "trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery" and has "substantial latitude in fashioning protective orders." 467 U.S. at 36 (footnote omitted). Liggett's real complaint is that it disagrees with how the district

urt balanced the competing interests here, but that disagree-
ent provides no basis for granting its petition.

2. Nor do the Federal Rules of Civil Procedure contain any
ohibition on public disclosure of non-confidential discovery
aterials, and thus it is simply wrong for Liggett to suggest
at there is an open question on this point.

Questions about public access to discovery documents were
ly ventilated and resolved when Rule 5(d) was amended in
80. The initial draft of this amendment proposed that par-
s would no longer file discovery materials with the clerk
nless and until they are used in the proceedings." 77 F.R.D.
3, 622 (1978). This "no-filing" proposal was criticized by
e news media, and a middle course was selected in the final
e under which district courts were given the option of ex-
sing parties from filing discovery documents. However, the
visory Committee Note stated that filing should be generally
quired even if "no use is made of the materials after they
e filed," because discovery materials "are sometimes of
erest to those who may have no access to them except by
equirement of filing, such as members of a class, litigants
ilarly situated, or the public generally." 85 F.R.D. 521,
5. *See Agent Orange, supra*, 821 F.2d at 146. *See generally*
Wright & Miller, *Federal Practice and Procedure: Civil 2d:*
1152, at 438-40 (1986).

Thus, it is incorrect for Liggett to suggest that the Federal
es bar access to discovery materials "unless and until they
used at trial." Even when, as here, parties are temporarily
used from filing discovery materials with the clerk, the par-
s are free to disseminate discovery materials to third par-
unless a protective order is entered upon a finding of good
se under Rule 26(c). Nothing in that Rule compels the en-
of a blanket protective order, and Liggett cites no authority

to that effect. Indeed, the district court here would have been well within the bounds of its authority if it had refused to sign the initial protective order and had stated instead that it would bar dissemination of only those documents which a party showed were "confidential" within the meaning of Rule 26(c). That is what the district court did in *Cipollone*, *supra*, and the Third Circuit upheld that ruling. Liggett urged this Court to review that ruling last Term, making essentially the same arguments which it makes here. The Court denied certiorari then, and there is no basis for granting review now. *Cipollone v. Liggett Group Inc.*, 822 F.2d 335 (3d Cir.), *cert. denied*, 108 S.Ct. 487 (1987).

3. Nor is there any conflict between the circuits on the interpretation of the Federal Rules in this context. For example, the Seventh Circuit enunciated the relevant inquiry under Rule 26(c) in the same general terms used by the First Circuit: "As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings." *American Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 596 (1978), *cert. denied*, 440 U.S. 971 (1979). And as previously noted, the Second Circuit recently upheld a similar unsealing motion with respect to the non-confidential discovery materials which were produced in the *Agent Orange* case, taking an approach very similar to that taken here: "if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection . . ." *Agent Orange*, *supra*, 821 F.2d at 145-46. That opinion also made the rather obvious point — which Liggett never addresses — that pretrial protective orders would be entirely unnecessary unless the Rules presumed that parties could disseminate information learned in discovery to third parties. *Id.* at 146. Opinions in other circuits are to the same effect.

E.g., Oklahoma Hospital Ass'n v. Oklahoma Publishing Co., 748 F.2d 1421, 1424 (10th Cir. 1984), *cert. denied*, 473 U.S. 905 (1985); *In re Alexander Grant & Co., supra*, (11th Cir.); *Krause v. Rhodes*, 671 F.2d 212 (6th Cir.), *cert. denied*, 459 U.S. 823 (1982). Since the law has developed quite consistently in this area, there is no conflict for this Court to resolve.

4. Finally, Liggett asks the Court to exercise its supervisory authority because of a fear that the ruling below will result in the district courts being "burdened with a substantial increase in discovery disputes and protective order litigation" (Pet. at 14) (initial capitals and italics omitted). Review is not warranted on this basis for essentially two reasons.

First, the previous discussion has shown how the decision below is consistent with *Seattle Times*, the Federal Rules of Civil Procedure, and rulings in other circuits. Accordingly, it cannot be said that this ruling has "so far departed from the accepted and usual course of judicial proceedings" that intervention by this Court is required. S. Ct. R. 17.1(a).

Second, there is a very practical reason why the decision below will not cause an explosion of time-consuming litigation on these issues: District judges have no desire to expend their time or energies refereeing such disputes, and they are unlikely to enter pretrial protective orders which will increase their workload in this manner. The point is illustrated by this case and *Agent Orange*. Although the trial judges in both cases were willing to reconsider the reasons for secrecy once each case was over, both of them steadfastly refused to modify the blanket seal while discovery was still in progress, citing in each instance the desire to move the case to trial.

But even if Liggett's prediction should come true, and the decision below should prompt similar motions in the future, that prospect provides no basis for granting review here. A

district court is not compelled to grant unsealing motions simply because a case is over, and it may conclude in a given case that circumstances have not changed to such an extent that a seal should be lifted. Moreover, both here and in *Agent Orange*, the district courts were persuaded to modify their orders by overriding public policy considerations which are unlikely to be present in many other cases. Since decisions about modifying seals turn on the facts of each case, and since district courts have ample power to protect litigants and themselves from the concerns which Liggett raises, review of this decision should be denied.[3]

Furthermore, we note that this case provides a poor vehicle for exploring these issues because of its unusual factual setting. Although Liggett has strenuously opposed disclosure of the Little documents, it never availed itself of the procedural safeguards in its own protective order by designating these records as confidential. Nor has Liggett indicated exactly how it would be harmed by disclosure. A footnote to the petition cites the risk of pretrial publicity affecting other cases (Pet. at 11 n.5), but that argument fails to acknowledge that under the First Circuit's pre-emption ruling (as well as similar rulings in three other circuits), Liggett is immune from liability under state tort law for any actions taken after 1 January 1966.

Moreover, between the time that the district court granted our motion and the time that the First Circuit issued its opinion, the *Cipollone* case was tried to a verdict in New Jersey.

---

[3]Liggett also argues (at 15-16) that even if litigants are allowed to claim that documents stamped "confidential" should remain exempt from a general unsealing order, litigation over this point would be an enormous drain on judicial resources. Since Liggett has never claimed that these documents are confidential, it cannot seek review on this ground, but in any event, the cases it cites do not support its assertion.

The news media described the contents of various Little documents which were introduced in evidence during that trial; respondents noted this fact in their brief to the court of appeals and appended some of the articles which discussed the Little papers to their brief. Liggett never addressed this point or sought to explain why this development did not undermine its claim that disclosure of the records at issue here will be prejudicial. In effect, Liggett's petition assumes that only abstract issues are at stake here, and its failure to ground those issues in the facts of this case eliminates any arguable basis for granting review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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